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No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN R. CONNOR,

Appellant,

vs.

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N. L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

John R. Connor, Pro se
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Millburn, New Jersey 07041
(201) 762-5587

24 April, 1987

QUESTIONS PRESENTED

1. Whether N.J.S.A. 2A:31-2 violates the Equal Protection Clause of the Fourteenth Amendment because of its differing standards for who may bring claims on behalf of the beneficiaries of a death action: if a decedent has died testate, only the executor or administrator, c.t.a., may prosecute a wrongful death action; if a decedent has died intestate, anyone beneficially interested may be appointed administrator ad prosequendum.*

2. Whether the order of the New Jersey Supreme Court dismissing the appeal in this matter and the judgment of the Appellate Division rest on adequate and independent state grounds, thus depriving the U. S. Supreme Court of jurisdiction.

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* This phrasing of the federal question eliminates references in the Appellate Division's version to death actions brought "on behalf of [decedent's] estate." Under New Jersey law, recovery under the statute forms no part of the estate of the deceased. Gottlieb v. North Jersey Street Ry. Co., 72 N.J.L. 480, 484-485 (E. & A. 1906).

PARTIES TO THE PROCEEDING

JOHN R. CONNOR, Appellant pro se
380 Wyoming Avenue
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R. G. SACHS, M.D., T. V. INGLESBY, M.D.,
J. A. BELLADONNA, M.D., N. L. MURRAY, M.D.,
C. J. WITTMAN, JR., M.D., Appellees

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(Thomas J. Alworth), for Appellees

OVERLOOK HOSPITAL, Appellee

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* Noticed of Appellant's challenge to the constitutionality of N.J.S.A. 2A:31-2, in accordance with New Jersey Rule 4:28-4.

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IN THE

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In the matter of

JOHN R. CONNOR,

Appellant,

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R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N. L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTION

JOHN R. CONNOR, the Appellant, appeals from the Final Order of the Supreme Court of

New Jersey, entered December 18, 1986 (App. B, infra, p. 2a), Motion for Reconsideration denied January 26, 1987 (App. A, infra, p. 1a), which dismissed Appellant's appeal of the Appellate Division's judgment in this matter (App. D, infra, pp. 4-8a), challenging the constitutionality of N.J.S.A. 2A:31-2, as written and applied to Appellant.

A Notice of Appeal to this Court was timely filed in the Supreme Court of New Jersey and the Appellate Division, on March 24, 1987, both courts being in possession of parts of the record. (App. Q, infra, pp. 32-34a).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2). Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921) sustains the jurisdiction of this Court to review the Final Order of the New Jersey Supreme Court and judgment of the Appellate Division by appeal in this case. The Appellate Division opinion is not reported.

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> . . .[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New Jersey Constitution (1947), Article 6, Section 5, Paragraph 1 provides in part:

> 1. Appeals may be taken to the Supreme Court:
>
> (a) In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State;
>
> * * *
>
> (d) On certification by the Supreme Court. . .

N.J.S.A. 2A:31-2 provides:

> Every action commenced under this chapter shall be brought in the name of an administrator ad prosequendum of the decedent for whose death damages are sought, except where decedent dies testate, and his will is probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the case may be, shall bring the action.

N.J. Sup. Ct. C. P. R. 2:2-1(a) provides in part:

> Appeals may be taken to the Supreme Court from final judgments as of right: (1) in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State. . .

N.J. Sup. Ct. C. P. R. 2:2-1(b) provides in part:

> Appeals may be taken to the Supreme Court from final judgments on certification to the Appellate Division pursuant to R. 2:12.

STATEMENT OF THE CASE

The Appellant, JOHN R. CONNOR, is the son of decedent Mary A. Connor, who passed away on November 24, 1977 at Overlook Hospital in Summit, New Jersey. Decedent, who was suffering from an undiagnosed condition of pancreatitis, died as a result of cardiac shock following exploratory surgery. Under the terms of her will, Appellant was appointed executor, however, by virtue of a provision in the (1979) judgment admitting the will to probate, Appellant was prohibited from serving as executor.[1]

In 1978, the Superior Court of New Jersey appointed an Administrator (Warren) to represent the estate, after finding that "Mary A. Connor, late of the County of Essex and State of New Jersey, died on November 24, 1977, intestate. . ." (App. O, infra, p. 28a) (emphasis added).

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[1] Connor v. Phillips, cert. den. 455 U.S. 991, reh. den. 456 U.S. 939 (1982).

While Appellant was engaged in appealing the Warren appointment,[2] the Administrator, on September 21, 1978, secured a warrant for Appellant's arrest for an alleged contempt in connection with the estate. The warrant was never executed but was replaced on January 4, 1979 with a Supplementary Warrant which was executed eight months later on September 23, 1979, at which time Appellant was arrested and incarcerated in the Essex County jail for 4 days and only released upon his agreement to surrender possession of his mother's will to the Administrator. (No contempt was ever found by the court). However, while decedent's will was taken from Appellant on September 26, 1979, the document was not immediately probated by the Administrator. The probate hearing was not held until November 14, 1979 while the judgment granting probate (which simultaneously removed the Administrator and appointed an Administrator, C.T.A.)

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[2] Connor v. Warren, cert. den. 449 U.S. (1981).

was not signed by the court until December 3, 1979. On November 24, 1979, a date precisely in between the November 14th probate hearing and the filing of the probate judgment on December 4, 1979 - the two year period in which a Wrongful Death action had to be filed was due to expire.

Consequently, on November 15, 1979, Appellant wrote the Administrator and requested that he file a complaint for the wrongful death of his mother. By his letter of November 16th, Administrator Warren communicated his refusal to file the suit, as a result of which Appellant filed the complaint, himself, on November 21, 1979. The complaint is framed, in part, in Appellant's own right and, in part, in right of the Administrator: "JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor,

Robert L. Connor and Carol Moken." (See: App. E, infra, p. 9a).

* * *

The first phase of this litigation encompassed limited discovery by the parties, principally in the form of written and supplementary interrogatories and a Request for Admissions. However, on August 5, 1980, the matter was stayed while Appellant prosecuted a collateral suit in an ultimately unsuccessful attempt to reverse his exclusion as executor. Since 1980, Appellees had filed several motions to dismiss the action on the ground that Appellant lacked "standing" under N.J.S.A. 2A:31-2, which statute specifically provides that only an Executor or Administrator, C.T.A., can prosecute a wrongful death action where the decedent dies testate. Appellees' last such motion succeeded, on February 10, 1984, giving rise to the within appeal. (App. E, infra, pp. 9-10a).

Prior to the dismissal of this action in 1984, the trial court (located in Union County, New Jersey) made an "of record" effort to resolve the "standing" problem in this case by ordering Appellant to apply, first, to the Surrogate of Essex County (decedent's resident county) and, next, to the Probate Part of the Superior Court of New Jersey in Essex County for letters ad prosequendum. (App. F, infra, p. 11a and App. H, infra, p. 16a). Both applications were denied (App. G, infra, pp. 13-14a and App. I, infra, p. 17a). In the latter instance, Appellant's show cause papers were not even filed but returned with an explanation that "[t]he law of the State of N. J. does not provide for the appointment of an administrator ad prosequendum for any person dying testate." (App. I, infra, p. 17a). Appellant then moved before the Union County court in this matter for letters ad prosequendum, which application was denied by the trial court on June 7, 1983. (App. H, infra, p. 15a).

Following the dismissal of this action by the trial court, Appellant appealed to the Appellate Division of the Superior Court of New Jersey.

Two years later, on May 29, 1986, the Appellate Division issued a per curiam opinion which reversed the dismissal and remanded the case for further proceedings. (App. D, infra, pp. 4-8a). In its opinion, the appellate court declined to decide the constitutional issue raised by Appellant, stating: "[w]e need not reach the constitutional issue raised by plaintiff that N.J.S.A. 2A:31-2 violates equal protection of the law because of its differing standards for who may bring claims on behalf of testate and intestate estates. . ." Id., at 6a. The Appellate Division then remanded the case:

> to provide an opportunity to plaintiff, within 30 days of the date of our remand, to request Phillips to substitute as party plaintiff and to maintain the wrongful death action and to provide a further opportunity if

> Phillips refuses, within 30 days thereafter, to join Phillips as a party defendant in order to compel his substitution as plaintiff or, alternatively, to appoint the present plaintiff as administrator ad prosequendum.

Id., at 7a. Appellant's Motion for Reconsideration was denied on July 1, 1986. (App. C, infra, p. 3a). Appellant elected not to immediately carry out the terms of remand and filed an appeal with the New Jersey Supreme Court, arguing the constitutional invalidity of N.J.S.A. 2A:31-2 under the Equal Protection Clause of the Fourteenth Amendment. Appellee (respondent-physicians) moved for a dismissal on the ground that Appellant was not entitled to a second appeal and should, instead, have petitioned for certification. On December 18, 1986, the New Jersey Supreme Court entered an order dismissing the appeal, without explanation (App. B, infra, p. 2a), and denied Appellant's Motion for Reconsideration on January 26, 1987. (App. A, infra, p. 1a).

* * *

During the pendency of Appellant's appeal to the New Jersey Supreme Court, the trial court, on September 12, 1986, entered an order granting summary judgment and dismissing the complaint in this action as to defendant Overlook Hospital because of Appellant's "failure to comply with the [remand] decision of the Appellate Division filed on May 29, 1986." (App. J, infra, pp. 18-19a). The court found that Appellant, by not complying with the remand,"ha[d] waived and is estopped from any further claim of standing in this matter by its own conduct." (App. K, infra, pp. 20-21a).

On January 30, 1987, however, with a different judge presiding, the trial court denied the application for dismissal as to the remaining defendant-physicians and granted a stay of proceedings pending the result of the within appeal to the U. S. Supreme Court. (App. L and App. M, infra, pp. 22-25a).

The court's order denying dismissal stated that: "plaintiff has met the time limits set forth in the Appellate Division opinion filed May 29, 1986 because the time limits therein were tolled by the pendency of the appeal to the New Jersey Supreme Court, dismissed on December 18, 1986; and (2) plaintiff's application for a further stay pending final decision on plaintiff's application to the U. S. Supreme Court has been granted." (App. L, infra, p. 23a).

* * *

The federal question presented in this appeal, involving the constitutionality of N.J.S.A. 2A:31-2, was raised by Appellant in the trial court as a cross-motion in response to defendants' motion for dismissal. Specifically, Appellant cross-moved for a Declaratory Judgment adjudging the statute in violation of the Equal Protection Clause of the Fourteenth Amendment. Neither the cross-motion

(nor an alternative cross-motion to substitute the Administrator, C.T.A. as plaintiff) was decided by the trial court when it dismissed this action. (See: App. E, infra, pp. 9-10a).[3] In the Appellate Division, the federal question was raised by Appellant in his merits briefs and at oral argument, however, the appellate court declined to decide the issue. (See: App. D, infra, p. 6a). The federal question was again presented to the New Jersey Supreme Court, in Appellant's merits briefs and Motion for Reconsideration, however the court dismissed the appeal without explanation and without deciding the federal question. (See: App. A and B, infra, pp. 1-2a).

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[3] The Appellate Division's opinion erroneously stated that: "[p]laintiff appeals pro se from the dismissal on motion of the wrongful death action * * * and from the denial of his cross-motion to declare N.J.S.A. 2A:31-2 unconstitutional or, alternatively, to substitute Lucas E. Phillips, Jr., administrator of his mother's estate, as party plaintiff." (See: App. D, infra, p. 5a) (Emphasis added). In fact, the two cross-motions formed no part of the appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. Whether N.J.S.A. 2A:31-2 violates the Equal Protection Clause of the Fourteenth Amendment because of its differing standards for who may bring claims on behalf of the beneficiaries of a death action: if a decedent has died testate, only the executor or administrator, c.t.a., may prosecute a wrongful death action; if a decedent has died intestate, anyone beneficially interested may be appointed administrator ad prosequendum.

The federal question in this case, whether New Jersey may bar an interested beneficiary from filing a Wrongful Death action upon the Administrator's refusal to file suit is a new and substantial question which has specifically never been decided by either New Jersey courts or the U. S. Supreme Court.

N.J.S.A. 2A:31-2, the statute at issue in this appeal, governs who may prosecute a wrongful death action:

> Every action commenced under this chapter shall be brought in the name of an administrator ad prosequendum of the decedent for whose death damages are sought, except where decedent dies testate, and his will is probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the case may be, shall bring the action.

(Emphasis added). The reason for Appellant's constitutional challenge to the statute is because the trial court dismissed this suit, with prejudice, on a finding that Appellant who is neither executor or administrator, c.t.a., lacked "standing" to maintain the action under this statute. (App. E, infra, pp. 9-10a).

The individuals who are entitled to recover damages under the statute are those "persons entitled to take any intestate personal property of the decedent. . ." N.J.S.A. 2A:31-4. Thus, the right to recover damages caused by an offense is a property right of an interested beneficiary within the protection

of the Fourteenth Amendment:

> An action for wrongful death is brought for the exclusive benefit of the persons entitled to take intestate property of the decedent. N.J.S. 2A:31-4. The administrator ad prosequendum is merely a nominal representative of the class mentioned, since he acts as fiduciary for the general administrator who is charged with distribution of the funds recovered.

Glucksman v. Strelecki, 102 N.J. Super. 53, 58 (Law Div. 1968). (Emphasis added).

Historically in New Jersey, Wrongful Death actions were required to be brought in the name of the personal representative of the deceased. 2 Comp. Stat. 1904-1908, §8. However, the 1917 supplement to the Death Act provided for the institution of such actions in the name of an administrator ad prosequendum, where the decedent died intestate. Pamph. L. 1917, ch. 180, p. 531. In ascertaining the purpose of the 1917 supplement, the New Jersey Court of Errors and Appeals has found: "[s]uch representative ad prose-

quendum seems to be required only for the purpose of providing some person to prosecute the action. . ." Loughney v. Thomas, 117 N.J.L. 169, 172 (E. & A. 1936). The court also found such administrator to be "a mere trustee to bring and conduct the action. . ." Id., at 173. (Emphasis added).

Heretofore in New Jersey, N.J.S.A. 2A:31-2 has been strictly construed to prohibit any person, other than an executor or administrator, c.t.a., from prosecuting a Wrongful Death action, where the decedent dies testate. "No administrator ad prosequendum will be appointed to prosecute a death action where the decedent dies testate. An executor or administrator with the will annexed must prosecute the action." 8 Clapp, New Jersey Practice, Wills and Administration §716 at 297 (1985). In Schueler v. Strelinger, 43 N.J. 330 (1964), the New Jersey Supreme Court specifically held that a father had no

individual right of action under the Death Act for pecuniary loss as a result of his daughter's death, but that such cause of action "must be brought by an administrator ad prosequendum in case of intestacy, or by an executor where (as here) the decedent left a will." Id., at 349. (None of these cases, however, deals with a beneficiary bringing a death action upon the fiduciary's refusal to file suit).

However, where a decedent dies intestate, any person beneficially interested may receive letters ad prosequendum. N.J.S.A. 3B:10-11 (formerly N.J.S.A. 3A:6-13), which implements N.J.S.A. 2A:31-2, allows issuance of letters ad prosequendum "to the person entitled by law to general administration" (either the "surviving spouse," the "remaining heirs" or to "any other person as will accept the administration"). In point of fact and practice, "[t]hese letters may be

obtained not only in an action instituted by the widow or next of kin as plaintiff * * * but also in an action instituted by any interested person." Clapp, supra, at 296 n. 1 (1985).

Consequently, N.J.S.A. 2A:31-2, as written and applied, creates a dual office for the prosecution of wrongful death actions for intestate decedents (General Administrators, who receive and distribute the proceeds and Administrators Ad Prosequendum, who file the action); and any "interested" person may receive the letters. The very wide range of classes who are eligible to receive letters where there is an intestacy ("spouse," "next-of-kin" and "interested persons") narrows to only one individual where the decedent dies testate: the executor or administrator, c.t.a. Consequently, where there is an intestacy, the "opportunity" exists for a Wrongful Death suit to be filed where an administrator fails

or refuses to prosecute the action. No similar remedy is provided in the event of testacy, however, because the fiduciary has the exclusive right to bring a death action.

Thus a strict construction interpretation of N.J.S.A. 2A:31-2 (as applied against Appellant) not only invidiously discriminates against the spouse, next-of-kin and interested beneficiaries of the testate decedent but also their per se exclusion from administration ad prosequendum is entirely "arbitrary" because the exclusion depends solely on the nonrelevant criteria of whether the decedent left a will.

* * * *

The signifigance of the federal question here presented is manifest by the extreme length to which the state courts have gone in order to moot the federal issue in this appeal (see: Argument B, infra). Even though we are dealing with a question of first im-

pression, a brief review of applicable precedent indicates that N.J.S.A. 2A:31-2 violates the Equal Protection Clause, as written and applied to Appellant.

As long ago as 1903, the Supreme Court held that the equal protection "provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed." Field v. Barber Asphalt Co., 194 U.S. 618, 621-622 (1903). In Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1910), the Court, while affirming the wide scope of a State's discretionary power to classify for legislative purposes, stated:

> A classification having some reasonable basis does not offend against that [Equal Protection] clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

Id., at 78. (Emphasis added). However, the classifications "must be reasonable, not

arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1919). See also: Louisville Gas Co. v. Coleman, 277 U.S. 32 (1928). "Under our constitutional system the States in determining the reach and scope of particular legislation need not provide 'abstract symmetry' * * * 'the Constitution does not require things which are different in fact or opinion to be treated as though they were the same' * * * 'the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines and seeks to bring within the lines all similarly situated so far and so fast as the means allows.' " Skinner v. Oklahoma, 316 U.S. 535, 539-540 (1941). (Emphasis added).

In Ferguson v. Skrupa, 372 U.S. 726 (1963), the Court stated: "[s]tatutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." Id., at 732. Applying the test enunciated in Royster Guano Co., supra ("all persons similarly circumstanced shall be treated alike"), the Court found unconstitutional a Massachusetts statute that made it a felony for anyone to distribute contraceptives, except by a registered physician or pharmacist, and then only to a married person. The Court, in applying the rational basis test, found that "[e]nforcement of the * * * statute will materially impair the ability of single [unmarried] persons to obtain contraceptives." Eisenstadt v. Baird, 405 U.S. 438 (1972).

The classic interpretation of equal protection theory in Tussman and ten Broek, The Equal Protection of the Laws, 37 Calif. L.

Rev. 341 (1949), affords clarification as to determining whether a classification is "reasonable":

> where are we to look for the test of similarity of situation which determines the reasonableness of a classification? The inescapable answer is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law.

(Emphasis added).

The "purpose" of New Jersey's Wrongful Death statute is defined in N.J.S.A. 2A:31-1 which states that an action lies "[w]hen the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury. . ." Under the aforementioned criteria, N.J.S.A. 2A:31-2, as written and applied to Appellant, is

"invidiously" discriminatory because it does not treat alike all persons "similarly situated" ("spouse," "next of kin," "person interested") with respect to the purpose of the statute. This is not merely a situation betraying "some inequality," Lindsley, supra, but rather a total inequality where members of the aforesaid classes only possess the right to prosecute death actions in the event of an intestacy, and not at all where the decedent dies testate.

* * * *

The "substantiality" of the federal question in this appeal is evidenced by the New Jersey Supreme Court's ruling in the case of Schmoll v. Creecy, 54 N.J. 194 (1969). In Schmoll, supra, the trial court had found that illegitimate children could not recover damages under the Wrongful Death statute. In reversing for the children, the court asked:

"whether it is arbitrary to provide a [damages] remedy for a legitimate child and to deny a like remedy to an illegitimate child who sustained precisely the same injury." Id., 38 ALR 3d at 609.[4]

While the within appeal doesn't deal with the issue of damages and illegitimacy, but rather with the threshold question of standing-to-sue, this question is easily rephrased to apply to this case:

> Whether it is arbitrary to provide a remedy for an interested beneficiary of an intestate decedent and to deny a like remedy to the interested beneficiary of the testate decedent who sustained precisely the same injury?

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[4] In interpreting N.J.S.A. 2A:31-4, the damages section of the State's Wrongful Death statute, the State Supreme Court relied on the Supreme Court's decision in Levy v. Louisiana, 391 U.S. 68 (1967) which held Louisiana's death statute (La. Civ. Code Art. 2315) unconstitutional as construed to deny a right of recovery by illegitimate children, because it created an invidious discrimination contravening the Equal Protection Clause.

In contrast to New Jersey, the Wrongful Death statutes is some states specifically make allowance for the contingency when the personal representative fails or refuses to prosecute the suit. For example, Pennsylvania provides that "an action for wrongful death shall be brought only by the personal representative of the decedent. . ." Pa.R.Civ.P. §2202(a). However, in the event the personal representative fails to institute suit within six months of the decedent's death, then any person entitled by law to recover damages may sue on his own behalf. Pa.R.Civ.P. §2202(b). See: Beascoechea v. Sverdrup & Parcel and Assoc., Inc., 486 F. Supp. 169 (D.C. Pa. 1980).

In Cudney v. United Power & L. Corp., 142 Kan. 613 (1935), the Kansas Supreme Court interpreted a statute allowing a beneficiary to sue when no personal representative had been appointed, to apply to the situation

where a qualified administratrix had been discharged without prosecuting the wrongful death action.

In Harris v. Rex Coal Co., 177 Ky. 630 (1917), the Court of Appeals of Kentucky held that the mother of the decedent had the right to start a death action where an administrator attempted some sort of fraudulent settlement with the party responsible for decedent's death. "This she had a right to do upon the refusal of the administrator to sue, although the right of action was * * * originally in him." Id., 197 S.W. at 1075. (Emphasis added). This exception was upheld as recently as 1978 by the Supreme Court of Kentucky which ruled that: "[c]ontrary to the requirements of KRS 411.130, when a personal representative refuses to bring an action, the beneficiary may do so in her own name." Wheeler v. Hartford Acc. & Indem. Co., 560 S.W. 2d 816 (Ky. 1978).

In Bailes v. Southern Railway Company, 227 S.C. 176, 87 S.E.2d 481 (1955), the Supreme Court of South Carolina allowed a beneficiary to maintain a wrongful death action under circumstances where the brother's administrator had schemed to defraud the beneficiaries by settling the death claim for $450 without their knowledge and consent, and the administrator refused to file the death action. The statute provided that "an action for wrongful death 'shall be brought by or in the name of the executor or administrator,' " id. at 483, however, the court predicated its exception on the Law of Trusts:

> If a trustee refuse, after demand, to bring action in behalf of the trust estate or the beneficiaries thereof, or if he has an adverse interest or has conspired to defeat the trust, the beneficiary may himself bring the action against the third person, joining the trustee as a defendant. In doing so,

> the beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust. Bogert, Trusts and Trustees, Section 870, page 461; 54 Am. Jur. Trusts, Section 591, page 457 * * * The rule, which is frequently cited in other instances of trusteeship, is no less applicable where the trust relationship is that between an executor or administrator and the beneficiaries of a cause of action for wrongful death.

Id., 87 S.E.2d 484. (Emphasis added).

These decisions from the highest courts of other states are directly contra to the decision in the within appeal which, despite the Administrator's refusal-to-sue, is designed to effect the substitution of the Administrator, C. T. A., as plaintiff. (See: Argument B, infra). The result is especially anomalous in view of New Jersey's adherence to the exception to the general rule allowing beneficiaries to sue when the trustee fails or refuses to prosecute suits. See: Buchanan v. Buchanan, 75 N.J. Eq. 274,

71 A. 745, 746 (E. & A. 1909); Niemaseck v. Bernett Holding Co., 125 N.J. Eq. 284, 4 A.2d 794, 797 (Ch. Ct. 1939).

* * * *

The necessity of deciding the federal question in this appeal is further demonstrated by the ease with which a restrictive interpretation of N.J.S.A. 2A:31-2 in this case allowed "collusion" or "conspiracy" to surface between the personal representative and the defendants. See: Bailes, supra. In Appellant's Statement of the Case, infra, pp. 6-7, he related how the Administrator secured an arrest warrant for Appellant on September 21, 1978 and then waited a full year before executing it on September 23, 1979, having Appellant jailed for 4 days on the pretext of a contempt in order to gain possession of his mother's will - all the while, Appellant was still appealing from this fiduciary's

appointment, said appeal not being finally decided until 1981. (See: Statement of the Case, infra, n. 2, p. 6).

Can anyone seriously doubt that the real purpose of his actions was to prevent the filing of this suit? Particularly, when the probate, and exclusion of Appellant from his executorship, was conveniently delayed until 10 days after this suit had to be filed. These actions evidence a deep and pervasive conspiracy to defeat N.J.S.A. 2A:31-1 by creating a legal "limbo" in which, at the critical moment, an estate adjudged "intestate" was in process of becoming "testate," with an Administrator being replaced by an Administrator, C.T.A., after the former refused to file this suit.

Is this state of affairs one that, all intentions aside, is really outside the scope of N.J.S.A. 2A:31-2 which states that an action for Wrongful Death shall be brought

where there is a testacy when "decedent dies testate, and his will is probated, in which event the executor named in the will and qualifying. . ." N.J.S.A. 2A:31-2. (Emphasis added). In this case, the will of testate Mary A. Connor was not probated until December 4, 1979, and the new Administrator, C.T.A. did not qualify until a subsequent date. Isn't it arguable that this statute allows ample scope for judicial interpretation to permit an interested beneficiary to act when the intestate Administrator refused to file the action? Is this suit to fail because decedent Mary A. Connor died testate? Had there been no will, Appellant, regardless of the Administrator's refusal, could have received letters ad prosequendum a long time ago and the case would have been over.

The Supreme Court of New Jersey is not unfamilar with the practice, necessity and

advantage of judicial interpretation to avoid equal protection problems:

> In Schmoll, we interpreted the wrongful death statute to permit illegitimate children to recover despite the lack of any such provision in its explicit language and with knowledge that several amendments to place such a provision in the act failed to achieve passage. This construction was necessary to save the statute from constitutional infirmity as it otherwise would have denied equal protection guarantees.

State v. Zarinsky, 75 N.J. 101, 113 (1977).

Accordingly, due to the all-important necessity of closing a "loophole" inviting "collusion" in N.J.S.A. 2A:31-2, Appellant respectfully submits that this matter mandates plenary review by this Court. In addition, as further shown herein, the results reached by the New Jersey courts provide additional grounds for such review.

* * * *

B. Neither the Order of Dismissal of the New Jersey Supreme Court nor the judgment of the Appellate Division rest on Adequate and Independent State Grounds, thus this Court has jurisdiction.

In Ward v. Love County, 253 U.S. 17 (1920), the Supreme Court reaffirmed its rule that state courts cannot avoid deciding federal questions, and thereby defeat the Court's jurisdiction, by deciding a case on non-federal grounds which are without any fair or substantial support:

> Whether the right was denied, or not given due recognition, by the [state] Supreme Court is a question as to which the claimants were entitled to invoke our judgment * * * It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support (citations omitted) Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided.

Id., at 22. (Emphasis added).

The fact that a state's highest court declines review of a federal issue constitutes no bar to Supreme Court review. In Staub v. City of Baxley, 355 U.S. 313 (1958), the Court reversed the conviction of a labor organizer who violated a city ordinance which made it an offense to solicit dues-paying members without first applying for and receiving a permit. Although appellant claimed that the ordinance violated her First Amendment rights, the Georgia Court of Appeals declined to pass on the constitutional issue, ruling that appellant lacked the "standing" to attack the statute because she had made no attempt to obtain the permit whose constitutionality she was challenging. The Supreme Court found the nonfederal ground inadequate to bar review of the federal claim.

In Rogers v. Alabama, 192 U.S. 226 (1903) (a 2-page motion to quash a state murder indictment on ground of exclusion of colored persons from grand jury stricken on basis

of "prolixity"), the Supreme Court, in reversing judgment, stated that: "[i]t is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights." Id., at 230.

Especially relevant to the within appeal is Davis v. Wechsler, 263 U.S. 22 (1923) (a federal officer, attempting to claim a federal venue privilege, was found by the state court to have waived the defense when he failed to enter a "special" appearance under state law). In reversing judgment, the Court declared:

> We are of the opinion that the judgment must be reversed. Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not be be defeated under the name of local practice * * * it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way.

Id., at 24-25. (Emphasis added).

In the landmark case of Dahnke-Walker Co. v. Bondurant, 257 U.S. 282 (1921), the Supreme Court, in discussing the circumstances under which a state court decision will be reviewed on appeal (versus certiorari), stated that:

> In the state court the petitioner did not simply claim a right or immunity under the Constitution * * * but distinctly insisted that as to the transaction in question the Kentucky Statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The [state] court did not accede to the insistence, but applied and enforced the statute. Of course that was an affirmation of its validity when so applied * * * the mode of review depends on the way in which the state court resolves the question. If it be resolved in favor of the validity of the statute the review may be on a writ of error; and if it be resolved against the validity the review can only be on writ of certiorari.

Id., at 289. (Emphasis added).

In its per curiam opinion herein, the Appellate Division declined to decide

Appellant's constitutional challenge to N.J.S.A. 2A:31-2. However, an analysis of the decision's terms of remand,[5] reveal them to be a "springe-laden" device that, once executed, would not only immunize the statute from Appellant's constitutional challenge but would also apply the statute to the disadvantage of Appellant's federal claim - a decision "in substance and effect" wholly in favor of the statute. Dahnke, supra. This result would inevitably have ensued had Appellant, within the first 30-day period, contacted the Administrator, C.T.A., to request his substitution as party-plaintiff. Such conduct on Appellant's part would undoubtedly trigger a waiver of his federal claim to "standing" and automatically propel

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[5] "We remand to provide an opportunity to plaintiff, within 30 days of the date of our remand, to request Phillips to substitute as party plaintiff * * * and to provide a further opportunity if Phillips refuses, within 30 days thereafter, to join Phillips as a party defendant in order to compel his substitution as plaintiff or, alternatively, to appoint the present plaintiff as administrator ad prosequendum." (App. D, p. 7a).

Phillips into the suit as party-plaintiff.

That the Appellate Division is alert to consequences of waivers is seen in its decision in Sturdivant v. General Brass & Machine Corp., 115 N.J. Super. 224 (App. Div. 1971):

> It has been broadly asserted that any act on the part of a party by which he impliedly recognizes the validity of a judgment against him operates as a waiver of his right to appeal therefrom, or to bring error to reverse it, and clearly one who voluntarily acquiesces in or ratifies a judgment against him cannot appeal from it. The acquiescence which prohibits an appeal, or destroys it when taken, is the doing or giving of the thing which the decree commands to be done or given.

Id., at 227. (Quoting from 4 Am.Jur. 2d, Appeal and Error, §242 at 737).

The New Jersey Supreme Court is similarly vigilant with respect to waivers of constitutional claims. In Brogan v. The Passaic Daily News, 22 N.J. 139 (1956), that court declined to rule on a constitutional challenge to N.J.S.A. 2A:81-10 (newspapermens'

privilege against disclosure of source of published information) "in view of the fact that whatever immunity was conferred on the defendants by the statute was waived. . .," id. at 155, when the witness testified "that he received his information from 'a reliable source' and then testifying as to the information he had received." Id., at 154. See also: Henry v. Mississippi, 379 U.S. 443 (1965) (Supreme Court vacated judgment of conviction and remanded for a hearing on the question whether petitioner had knowingly waived a decision of his federal claim when timely objection was not made to the admission of illegally-seized evidence).

By ordering Appellant to re-enact the "request and refusal" scenario that originally occurred between Appellant and Administrator Warren in November, 1979, which refusal constitutes the basis of Appellant's claim to "standing" in this action, the Appellate Division attempted to change the

factual predicate underlying this action - seven (7) years after the two-year Statute of Limitations has expired. N.J.S.A. 2A:31-3. Such a re-enactment would create a limitations problem which the suit does not now possess, particularly in view of the Appellate Division's election to: "not resolve issues which may be raised on remand: whether the Statute of Limitations may be raised as a defense if Phillips is substituted as plaintiff. . ." (App. D, infra, p. 7a).

That the Appellate Division's remand terms have, as their intended result, the mooting of Appellant's federal claim through waiver and his replacement by the Administrator, C.T.A., is evidenced by the court's disregard of the fact that Phillips, by virtue of his being the successor in office to Administrator Warren, remains in privity with him. Phillips, therefore, as a matter of law, is bound by the original (1979) refusal of Ad-

ministrator Warren to file this suit.[6] As succinctly stated by the Southern District of New York:

> Privity between persons denotes the relationship arising out of mutual rights or successive rights in the same property or interest, as, for example, successors in a particular office, or assignee and assignor, or executor and testator. Acheson v. Albert, 90 U.S. App. D.C. 294, 195 F.2d 573 (1952); 72 C.J.S. Privity; Privies; Privy, pp. 954-962 (1951).

Mobay Chemical Co. v. Hudson Foam Plastics Corp., 277 F. Supp. 413 (S.D.N.Y. 1967).

The final "springe" set to guarantee the substitution of the Administrator, C.T.A., as party-plaintiff is found in the alternative remand term which provides that "if Phillips refuses, within 30 days thereafter, to join Phillips as a party defendant in order to

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[6] In its opinion, the Appellate Division attempted to exonerate Administrator Warren: "[Warren] declined to [file this action] on the ground that his appointment as administrator was for a limited purpose only." (App. D, infra, p. 5-6a). However, the judgment appointing Warren, and his Letters of Administration, evidence a general, not a limited appointment. (App. O and P, infra, 28-31a).

compel his substitution as plaintiff. . ." (App. D, infra, p. 7a). (Emphasis added). With Appellant's constitutional waiver having already occurred in the first 30-day period, this "option" would have remained the sole alternative remedy. However, this "novel" procedural device of joining-a-defendant-in-order-to-make-him-a-plaintiff finds no support in the law. It represents a corruption of the Law of Trusts, wherein the "non-suing" trustee is joined as a defendant by the plaintiff-cestui que trust to remain a defendant and not to replace the cestui que as plaintiff. Quoting from the New Jersey Court of Errors and Appeals:

> the only exception to the rule above stated [only a duly-appointed administrator is competent to sue, either at law or in equity] arises when, although there is an administrator, he neglects or refuses to prosecute suits for the recovery of his decedent's estate. In such case, the next of kin may sue * * * joining the personal representative as a party defendant.

Buchanan v. Buchanan, 75 N.J. Eq. 274, 71 A. 745, 748 (1909). See also: Niemaseck v. Bernett Holding Co., 125 N.J. Eq. 284 (Ch. Ct.

1939).

In final support of Appellant's contention that the Appellate Division's terms of remand are designed to "springe" the federal issue, and Appellant, out of the case entirely, one need only review the proceedings held in this action on September 12, 1986 when, notwithstanding the pendency of this appeal in the New Jersey Supreme Court, the trial court dismissed the complaint as to defendant-Overlook Hospital "for failure to comply with the [remand] decision of the Appellate Division filed on May 29, 1986." (App. J, infra, pp. 18-19a). The court, unable to find a waiver of the federal issue on the ground that Appellant had contacted the Administrator, C.T.A., proceeded and found an estoppel because Appellant had not done so:

> Accordingly, it's this Court's finding * * * that there would not be a standing by this plaintiff to go forward or failure to show that it had standing or had complied with the Appellate Division pre-requisites to obtain

> standing * * * and, therefore, has waived and is estopped from any further claim of standing in this matter by its own conduct.

(App. K, infra, p. 21a). (Emphasis added).

The foregoing analysis establishes that the "non-federal grounds" disposition of this appeal by the Appellate Division is "without any fair or substantial support" in the controlling law, Ward v. Love County, supra, and that the "fair result of [the] decision is to deny the [federal] rights" entirely. Rogers v. Alabama, supra. Consequently, because the decision effectively substitutes the Administrator, C.T.A., for Appellant in this suit, it is, in fact, totally "in favor of" N.J.S.A. 2A:31-2. Dahnke, supra. Appellant, therefore, is entitled to Supreme Court appellate review under 28 U.S.C. §1257(2).

* * * *

Appellant's "as of right" appeal to the New Jersey Supreme Court was dismissed, without explanation, upon Appellees' motion arguing that Appellant did not have a right to a

second appeal, under R. 2:2-1(a), but should have petitioned for certification. R. 2:2-1(b). The dismissal is arbitrary and egregiously wrong, as a matter of state procedural law.

In N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), the Supreme Court (in upholding petitioner's due process claim that production of its membership lists trespassed upon their "liberty" interests) first addressed the state's contention that it lacked jurisdiction "because the denial of certiorari by the Supreme Court of Alabama rest[ed] on an independent nonfederal ground, namely, that petitioner in applying for certiorari had pursued the wrong appellate remedy under state law." Id., at 454-455. The state supreme court had refused to consider petitioner's federal questions, declaring that they could only be raised by way of mandamus. However, in light of earlier state decisions indicating that certiorari and mandamus were both available as alternative

remedies, the Supreme Court, in rejecting the State's "independent nonfederal ground" argument, upheld its jurisdiction to entertain the federal claim, stating:

> Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.

Id., at 457-458. (Emphasis added). That state decisional consistency is the due process test for determining noncompliance with local procedural rules was reaffirmed by the Court in Bouie v. City of Columbia, 378 U.S. 347 (1963):

> The basic due process concept involved is the same as that which the Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question.

Id., at 354. "[S]tate procedural requirements

which are not strictly or regularly followed cannot deprive us of the right to review." Barr v. City of Columbia, 378 U.S. 146, 148 (1964).

Art. 6, §5, ¶1 of the New Jersey Constitution provides, in pertinent part, that:

> 1. Appeals may be taken to the Supreme Court:
>
> (a) In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State;
>
> * * * * *
>
> (d) On certification by the Supreme Court. . .

In implementing Art. 6, §5, ¶1, the New Jersey Court Rules have added the additional qualification that the constitutional question be "substantial." R. 2:2-1(a)(1).

In the leading case of Tidewater v. Mayor and Council of Cartaret, 44 N.J. 328 (1965), the New Jersey Supreme Court established the guidelines for determining when a party may, without grant of certiorari, appeal to the

Supreme Court in a case involving a constitutional question:

> there must appear indication of true merit from the constitutional point of view, i.e., that the issue tendered is not frivolous and has not already been the subject of a conclusive judicial determination * * * Also, it should be noted that constitutional issues signifigant in the early development of a new area for such appeal purposes may become so settled through the course of judicial decisions as one day to become no longer worthy of a second review without leave. We conclude that cases falling into the type of this one are not appealable from the Appellate Division as of right.

Id., at 342-343. See: In re Windsor Mun. Util. Auth. v. Shapiro, 57 N.J. 168, 170 (1970); Deerfield Estates, Inc. v. Tp. of East Brunswick, 60 N.J. 115, 119-120 (1972). (Emphasis added).

The New Jersey Supreme Court's rule that "new" constitutional questions of substance proceed via appeal, and not by certification, was immediately reaffirmed by that court:

> The occasion arose recently to discuss the increasing number of direct appeals being taken under R.R. 1:2-1(a) where the asserted constitutional question has been clearly and conclusively settled * * * In such cases the proper avenue to be employed in seeking a direct review in this court is petition for certification, not appeal. . .

State v. Boyd, 44 N.J. 390 (1965). (Emphasis added).

As a matter of record, there exists no prior decision in New Jersey courts adjudicating an equal protection challenge to N.J.S.A. 2A:31-2. Moreover, all previous interpretations of this statute have construed this section to bar anyone, other than an executor or administrator, c.t.a., from maintaining a death action where the decedent dies testate. See: Schueler v. Strelinger, 43 N.J. 330 (1964). The "substantiality" of the equal protection issue in this appeal is evidenced in the analagous case of Schmoll v. Creecy, 54 N.J. 194 (1969) where the New Jersey Supreme Court allowed a second ("as of right") appeal on an

equal protection challenge to N.J.S.A. 2A:31-4, the "damages" section of New Jersey's Wrongful Death statute:

> and an appeal was taken to us as of right * * * because of the constitutional issue whether the denial of relief to these children because of their illegitimacy offends the equal protection clause of the Federal Constitution.

Id., at 194. (Emphasis added). In reversing judgment, the New Jersey Supreme Court held that, because the injury sustained by the illegitimate children was indistinguishable from the injury they would have sustained had they been born in wedlock, it would deny them equal protection of the law to refuse them a remedy granted to legitimate children.

Consequently, the within appeal falls within the Tidewater guidelines which established that "new" constitutional questions of substance proceed to the New Jersey Supreme Court via appeal and not the discretionary procedure of certification. Had the consti-

tutional question been "clearly and conclusively settled," State v. Boyd, supra, then certification would have been the correct mode of review. The question, however, being clearly "open," Appellant was entitled to an "as of right" appeal to the New Jersey Supreme Court. R. 2:2-1(a). Moreover,

> Whether or not a litigant is * * * deprived of a hearing to an extent forbidden by the due process clause essentially depends upon whether the posture adopted by the state court is arbitrary in the light of prior indications of the governing law; that is, on whether there has been a retroactive overruling of the procedural law in substance if not in form * * * due process is denied by any decision which * * * fails to give effect to, a rule of law that the state is constitutionally compelled to apply * * * The arbitrary denial of a federal claim is clearly reversible error. . .

Hill, The Inadequate State Ground, 65 Colum. L. Rev. 961-962 (1965). (Emphasis added). As succinctly stated in United States ex rel.

Herring v. Fenton, 531 F.Supp. 937 (1981): "when there is an appeal of right on a federal constitutional question, the Supreme Court of New Jersey has no discretion to decline to hear it. It is obliged to hear and decide it on the merits, by reason of N. J. Const. 1947, Art. 6, sec. 5, par. 1(a), quoted above. Neither the Legislature, by statute, nor the Supreme Court, by 'rule of practice and procedure,' can deny or degrade that State constitutional right." Id., at 946.

The New Jersey Supreme Court's dismissal of Appellant's appeal upon Appellee's argument that Appellant had pursued the wrong mode of appeal is therefore an "arbitrary" decision that is inconsistent with Art. 6, §5, ¶1(a) of the State Constitution and the prior interpretive decisions of that court, as enunciated in Tidewater v. Mayor and Council of Cartaret, supra, and applied in Schmoll v. Creecy, supra. The nonfederal ground is, therefore, inadequate to bar Supreme Court

review of the federal issue in this appeal.

* * * * * *

Generally, the Supreme Court's appellate jurisdiction has been exercised over state litigation only when a state's highest court has rendered a "[f]inal judgment or decree." 28 U.S.C. §1257. However, there is an exception when, although the highest state court has finally decided the federal question and there remain further proceedings in the lower state courts (even entire trials), the Supreme Court "has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. §1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477 (1975).

In California v. Stewart, 384 U.S. 436 (1966)(decided with Miranda v. Arizona), the

Supreme Court granted certiorari and affirmed a state court's reversal, and remand, of a conviction on federal constitutional grounds. Although the state might have again secured a conviction, the Supreme Court deemed the state judgment "final" in view of the "possibility" of an acquittal which, under state law, would have precluded a second appeal by the state.

In North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973), the State Supreme Court held unconstitutional a statute which predicated a pharmacy operating permit on ownership requirements, and ordered a remand to the State Board. "After reviewing the various circumstances under which the finality requirement has been deemed satisfied despite the fact that litigation had not terminated in the state courts, we entertained the case over claims we had no jurisdiction. The federal

issue would not survive the remand, whatever the result of the state administrative proceedings." Cox, supra, at 482. (Emphasis added).

Accordingly, the within appeal falls within the third category enunciated by the Court in Cox, supra:

> where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.

Id., at 481.

The present posture of the within appeal admits of further proceedings at the trial level, which conceivably could encompass a trial on the merits or perhaps nothing more than entry of an order dismissing the complaint as to the remaining defendant-physicians, defendant-Overlook Hospital having already been removed from the suit by order of the trial court entered September 12, 1986.

(App. J, infra, p. 18-19a). What is reason-certain is that, if the Supreme Court now declines review, the federal issue will "not survive the remand," Cox, supra, because of the waiver "springe" structured into the Appellate Division's remand formula.[7] In fact, not only would the federal issue not survive but also the entire case would probably be barred because of limitations.

In its opinion, the Appellate Division, declining to decide the limitations question, cited to the case of Wilson v. Dairymen's & c., Inc., 105 N.J.L. 188 (E. & A. 1928) "holding that a defendant is not prejudiced in an action brought within the Statute of Limitations by the substitution of the proper party plaintiff after the expiration of the two-

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[7] Appellant's cross-motion, pending since February, 1984, for a Declaratory Judgment adjudging N.J.S.A. 2A:31-2 unconstitutional, would also fail because of the waiver. Appellant's alternative cross-motion to substitute the Administrator, C.T.A., was withdrawn from the suit on January 30, 1987.

year period of limitations. . ." (App. D, infra, pp. 7-8a). In Wilson, supra, the New Jersey Court of Errors and Appeals allowed a post-limitations amendment of the plain- from the capacity of general administratrix to administratrix ad prosequendum, which designation the court deemed a mere "correction of a technical mistake." Id., 143 A. at 455. The plaintiff (Mrs. Wilson) was the same person and possessed fiduciary status from commencement of the action. In the case herein, we are dealing with an entirely different factual situation, where the action was filed by one having neither statutory standing nor any official capacity. Moreover, on the date this suit had to be filed, the estate was legally adjudged "intestate," albeit it was testate, and the Administrator, possessing decedent's unprobated will, refused to file this suit. It is quite possible that under these facts, the trial court would never ap-

ply the holding in Wilson, supra, but, more likely, that the negative holding in Jarvis v. Johnson, 3 N.J. Misc. 777 (Sup. Ct. 1925) would be the controlling precedent. In Jarvis, supra, the court, in allowing another amendmendment from Administratrix to Administratrix ad prosequendum, stated:

> This is not a situation where the suit was brought by one not possessing the requisite statutory qualifications. The plaintiff is the administratrix ad prosequendum. If she were not, she, of course, could not maintain this suit. Nor could she now acquire a status to proceed with the action for the reason that the two years' limitation within which such an action may be brought under the Death Act has expired. But her right to sue was acquired when she qualified as administratrix ad prosequendum and her suit was commenced within statutory time.

Id., at 778. (Emphasis added).

The history of this case since it was filed nearly 8 years ago, evidences a consistent unwillingness on the part of the New Jersey courts to properly resolve the "standing" (federal) issue raised by Appellant -

the only legal issue raised by Appellant on appeal; the state courts have merely engaged in one delaying tactic after another. As recounted in the Statement of the Case, infra, pp. 8-14, these tactics include: the trial court's directions to Appellant to apply to a different county's Surrogate and court for letters ad prosequendum, which applications were unsuccessful; the trial court's own denial of Appellant's application for issuance of letters on June 7, 1983; the 1984 dismissal of this suit by the trial court for "lack of standing," while failing to decide Appellant's cross-motion on his constitutional challenge to N.J.S.A. 2A:31-2; the refusal of the Appellate Division to decide the constitutional question and, after two years, producing, instead, a remand formula designed to moot the federal question entirely; and, finally, the refusal of the New Jersey Supreme Court to allow an "as of right" appeal on the constitutional issue, a decision that is

inconsistent with its own rulings on the criteria governing second "as of right" appeals.

In Cox, supra, the Supreme Court, in accepting jurisdiction of an appeal involving a federal question where additional proceedings remained, gave as one of its reasons:

> and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,' Radio Station WOW, Inc. v. Johnson, supra, at 124...

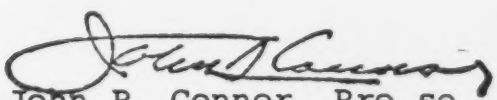
Id., at 477-478. For the identical reason, inter alia, Appellant's 8-year Calvary to acquire the legal standing to continue prosecution of this Wrongful Death suit to determine the defendants' liability for the death of Mary A. Connor, should now come to a close with the Supreme Court's acceptance of jurisdiction to review the New Jersey decisions in this case.

* * *

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal. However, in the event this Court's appellate jurisdiction under 28 U.S.C. §1257(2) is not appropriate here, Appellant requests review by writ of certiorari under 28 U.S.C. §1257(3). See: 28 U.S.C. §2103.

Respectfully submitted,



John R. Connor, Pro se

Dated: 24 April, 1987

APPENDIX "A"
(Filed: January 26, 1987)

SUPREME COURT OF NEW JERSEY
M-496 SEPTEMBER TERM 1986

26,036

JOHN R. CONNOR, etc.,	:	
	:	
Plaintiff-Movant,	:	
	:	ORDER
vs.	:	
	:	
R. G. SACHS, M. D., et al.,	:	
	:	
Defendants-Respondents.	:	
	:	

This matter having been duly presented to the Court, it is ORDERED that the plaintiff's motion for reconsideration of this Court's order of December 18, 1986 dismissing the appeal is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 21st day of January, 1987.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX "B"

(Filed: December 18, 1986)

SUPREME COURT OF NEW JERSEY
M-334 SEPTEMBER TERM 1986

26,036

JOHN R. CONNOR, etc.,	:	
	:	
Plaintiff-Respondent,	:	
	:	
vs.	:	ORDER
	:	
R. G. SACHS, M.D., et al.,	:	
	:	
Defendants-Movants.	:	

This matter having been duly presented to the Court, it is ORDERED that the motion to dismiss the appeal (A-138) is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 16th day of December, 1986.

/s/ Stephen W. Townsend

CLERK OF THE SUPREME COURT

APPENDIX "C"
(Filed: July 1, 1986)
ORDER ON
MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3491-83T3
MOTION NO. M-4504-85
BEFORE PART G

JUDGES: FURMAN
PETRELLA
COHEN

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor, etc

vs

R. G. SACHS, M. D., ET AL

MOVING PAPERS FILED June 11, 1986
ANSWERING PAPERS FILED
DATE SUBMITTED TO COURT June 24, 1986
DATE ARGUED
DATE DECIDED June 27, 1986

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

MOTION FOR RECONSIDERATION D E N I E D

FOR THE COURT:

/s/ David D. Furman, P.J.A.D.
DAVID D. FURMAN P.J.A.D.

WITNESS, THE HONORABLE DAVID D. FURMAN, PRESIDING JUDGE OF PART G, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 27 DAY OF JUNE 1986.

/s/ Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION

APPENDIX "D"

(Filed: May 29, 1986)

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3491-83T3

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiff-Appellant,

v.

R.G. SACHS, M.D., T.V. INGLESBY, M.D., J.A. BELLADONNA, M.D., N.L. MURRAY, M.D., C.J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants-Respondents.

Argued April 28, 1986 - Decided May 29, 1986

Before Judges Furman, Petrella and Cohen.

On appeal from the Superior Court, Law Division, Union County.

John R. Connor, appellant, argued pro se.

Mark D. DiGidio argued the cause for respondents R.G. Sachs, M.D., T.V. Inglesby, M.D., J.A. Belladonna, M.D., N.L. Murray, M.D., and C.J. Wittman, Jr., M.D. (Shanley & Fisher, attorneys; Thomas J. Alworth and Mark W. Lynch, on the brief).

R. Scott Eichorn argued the cause for respondent Overlook Hospital (McDonough, Murray and Korn, attorneys; Robert J. Logan, on the brief).

PER CURIAM

Plaintiff appeals pro se from the dismissal on motion of his wrongful death action on behalf of the beneficiaries of his mother's estate and from the denial of his cross-motion to declare N.J.S.A. 2A:31-2 unconstitutional or, alternatively, to substitute Lucas E. Phillips, Jr., administrator of his mother's estate, as party plaintiff.

Plaintiff instituted this action on November 21, 1979, within two years of his mother's death on November 24, 1977. He had been named executor in her will but had not qualified. An administrator had been appointed to submit plaintiff's mother's will for probate. Plaintiff requested the administrator to file this wrongful death complaint. He declined to do so on the ground that his appointment as ad-

ministrator was for a limited purpose only. The will was probated and Phillips appointed on December 4, 1979.

We need not reach the constitutional issue raised by plaintiff that N.J.S.A. 2A:31-2 violates equal protection of the law because of its differing standards for who may bring claims on behalf of testate and intestate estates: if a decedent has died testate, only the executor or administrator c.t.a. may prosecute a wrongful death action on behalf of his estate; if a decedent has died intestate, anyone beneficially interested may be appointed administrator ad prosequendum.

The trial court denied plaintiff's cross-motion to substitute Phillips in his stead as plaintiff on the sole ground that plaintiff had "presented no evidence that Lucas Phillips is now the administrator." At oral argument we were informed that Phillips is still serving as administrator c.t.a.; he has never formally

declined to be substituted as plaintiff or to maintain the wrongful death action.

Accordingly, we reverse the dismissal of plaintiff's complaint, which was based upon his lack of standing under N.J.S.A. 2A:31-2. We remand to provide an opportunity to plaintiff, within 30 days of the date of our remand, to request Phillips to substitute as party plaintiff and to maintain the wrongful death action and to provide a further opportunity if Phillips refuses, within 30 days thereafter, to join Phillips as a party defendant in order to compel his substitution as plaintiff or, alternatively, to appoint the present plaintiff as administrator ad prosequendum.

We do not resolve issues which may be raised on remand: whether the Statute of Limitations may be raised as a defense if Phillips is substituted as plaintiff, see Wilson v. Dairymen's, & c., Inc., 105 N.J.L. 188 (E. & A. 1928) holding that a defendant is not preju-

diced in an action brought within the Statute of Limitations by the substitution of the proper party plaintiff after the expiration of the two-year period of limitations; whether appointment as administrator ad prosequendum of a person beneficially interested, upon refusal of Phillips to be substituted as plaintiff, is within the trial court's authority as an implicit exception to N.J.S.A. 2A:31-2; or, if not, whether, N.J.S.A. 2A:31-2 is unconstitutional.

We reverse and remand in accordance herewith. We do not retain jurisdiction.

APPENDIX "E"

(Filed: February 14, 1984)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION UNION COUNTY

Docket No. L-14573-79

CIVIL ACTION

ORDER

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiff(s)

v.

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M. D. and OVERLOOK HOSPITAL,

Defendant(s)

This matter having been brought before the Court on motion of Shanley & Fisher, P. C., attorneys for defendants Sachs, Inglesby, Belladonna, Murray and Wittman for an Order dismissing the Complaint with prejudice due

to the plaintiff's lack of standing, and the Court having considered the matter and good cause appearing,

It is on this 10th day of February, 1984, ORDERED

that the Complaint filed herein be and the same is hereby dismissed with prejudice and without costs, as to all defendants.

/s/ Harry V. Osborne, J.
Harry V. Osborne, J.S.C.

APPENDIX "F"

(Filed: April 15, 1983)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. L-14573-79

CIVIL ACTION
(Medical Malpractice)

ORDER

JOHN CONNOR, et als., :

Plaintiffs, :

-vs- :

R. G. SACKS, et als., :

Defendants. :

JUDGE: Honorable Harry V. Osborne, Jr.

DATE: Friday, March 25, 1983.

PARTIES PRESENT OR REPRESENTED: John R. Connor, pro se, plaintiff and Robert L. Logan, Esq. (McDonough, Murray & Korn, P.A.)

ORDERED: 1. That plaintiff, John R. Connor shall qualify as administrator ad prosequendum of the Estate of Mary A. Connor within 20 days of the date of this order.

2. If plaintiff fails to qualify as administrator ad prosequendum within this time period, the plaintiff's complaint is dismissed for lack of standing.

3. That a copy of this Order shall be served upon attorneys for all parties within 7 days of the date of this order.

4. Plaintiff's cross motion for a stay pending decision of an appeal in Connor v. Besser et al is denied.

/s/ Harry V. Osborne Jr.
Honorable Harry V. Osborne, Jr.
Judge of the Superior Court

Dated: April 13, 1983

APPENDIX "G"

(Filed: May 2, 1983)

Docket No. 12,923 J

ESSEX COUNTY SURROGATE'S COURT

ADJUDICATION THAT DOUBTS AND DIFFICULTIES ARISE ON COMPLAINT FOR ADMINISTRATION AD PROSEQUENDUM

In the matter of the estate)
)
of Mary A. Connor)
)
deceased)

On Complaint for Administration Ad Prosequendum of John R. Connor, son of the deceased, and it being shown that the Last Will and Testament of Mary A. Connor was probated by an Order of the Superior Court of New Jersey, Chancery Division - Essex County dated December 3rd, 1979 and Lucas E. Phillips, Jr., Esq., was appointed Administrator with the Will Annexed:

It is thereupon on this 2nd day of May, 1983, pursuant to the statute in such case made and provided adjudged that difficulties arise upon the appointment of the said Com-

plainant.

NICHOLAS R. AMATO
Surrogate

By: /s/ Barbara J. DeBartola
Special Deputy Surrogate

APPENDIX "H"

(Filed: June 7, 1983)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. L-14573-79

JOHN R. CONNOR, et als,	:	Civil Action
Plaintiffs,	:	ORDER
vs.	:	
R. G. SACHS, M.D., et als,	:	
Defendants.	:	

This matter having been opened to the Court by the plaintiff pro se, John R. Connor, in the presence of Shanley & Fisher, P. C., by Thomas J. Alworth, Esq. and McDonough, Murray & Korn, Esqs., by Stephanie Briody, Esq., and the Court having considered the moving papers, supporting documentation and the arguments of counsel, and for cause shown

It is on this 6th day of June, 1983

ORDERED that plaintiff's motion for the entry of an order granting Letters Ad Prosequendum to the plaintiff be and the same is

hereby denied.

IT IS FURTHER ORDERED that the plaintiff, John R. Connor, shall apply to the Superior Court, Probate Part, Essex County, on or before June 17, 1983 for an Order granting Letters Ad Prosequendum to the plaintiff.

IT IS FURTHER ORDERED that further proceedings in this matter shall be stayed pending a resolution by the Superior Court, Probate Part, Essex County, of the aforementioned application to be initiated by John R. Connor.

IT IS FURTHER ORDERED that upon resolution of the matter to be filed in the Superior Court, Probate Part, Essex County, any of the parties hereto may then seek whatever relief they deem appropriate from this court.

/s/ Harry V. Osborne, Jr.
Harry V. Osborne, J.S.C.

APPENDIX "I"

ESSEX COUNTY SURROGATE'S COURT
Hall of Records
Newark, N. J. 07102

June 30, 1983

John R. Connor, Pro se
380 Wyoming Avenue
Millburn, NJ 07041

RE: In the Matter of the Estate of
Mary A. Connor

Dear Mr. Connor:

The law of the State of N.J. does not provide for the appointment of an administrator ad prosequendum for any person dying testate.

Accordingly, Judge Thompson has directed that your mailing, dated June 17, 1983, which was received by the Surrogate on June 28, 1983, be returned to you.

Please find said mailing enclosed, includ- your check for $20.00.

Very truly yours,

NICHOLAS R. AMATO, SURROGATE

/s/ George R. Boutillier
By: George R. Boutillier,
Assignment Clerk

GRB/pt

APPENDIX "J"

(Filed: September 12, 1986)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. L-14573-79

CIVIL ACTION
(Medical Malpractice)

ORDER GRANTING SUMMARY JUDGMENT ON BEHALF OF DEFENDANT, OVERLOOK HOSPITAL, OR, IN THE ALTERNATIVE, DISMISSING PLAINTIFFS' COMPLAINT

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor, etc., :

Plaintiffs, :

-vs- :

R. G. SACHS, M.D., et als, :

Defendants. :

JUDGE:

DATE OF MOTION: Friday, September 12, 1986, at 9:00 a.m.

PARTIES PRESENT OR REPRESENTED: None. The matter was submitted on the papers.

ORDERED: 1. That summary judgment is hereby granted in favor of defendant, Overlook Hospital.

2. Plaintiffs' Complaint is hereby

dismissed for failure to comply with the decision of the Appellate Division filed on May 29, 1986.

3. A copy of this Order shall be served upon attorneys for all parties within 7 days of the date of this Order.

FOR THE REASONS SET FORTH
BY THE COURT ON THE RECORD
ON Sept 12, 1986

/s/ Leonard S. Sachar
LEONARD S. SACHAR
J.S.C.

DATE OF
ORDER: 9-12-86

APPENDIX "K"

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CIVIL
DOCKET NO. L-14573-79

JOHN R. CONNOR, :

Plaintiff, : TRANSCRIPT OF PROCEEDINGS

-vs- : Motion

SACHS, et al, :

Defendant. :

- - - - - - - - - - - -

Friday, September 12, 1986
Union County Courthouse
Elizabeth, New Jersey

ORDERED BY:
JOHN R. CONNOR, pro se

BEFORE:
THE HONORABLE LEONARD R. SACHAR, J.S.C.

APPEARANCES:

JOHN R. CONNORS, pro se

MESSRS. McDONOUGH, MURRAY & KORN
Attorneys for Overlook Hospital
By: MELINDA FABRICANT, ESQ.

ANDREA MR. SANNIOLA
Official Court Reporter
License No. X101097

(Partial transcript)

[23] THE COURT: . . . In addition, the Court finds that the Appellate Division has set forth its conditions for the plaintiff to avail himself of requests to continue [24] and to have standing, that it was understood by the plaintiff that the plaintiff has chosen not to pursue the direction of the Appellate Division, has not secured a stay. Accordingly, it's this Court's finding that the complaint, even if it had not been dismissed by the Court, which it is on summary judgment, that there would not be a standing by this plaintiff to go forward, or failure to show that it had standing or had complied with the Appellate Division pre-requisites to obtain standing has not pursued the course open to the plaintiff to pursue standing and acquired standing and, therefore, has waived and is estopped from any further claim of standing in this matter by its own conduct. Therefore, the order of the defendant Overlook Hospital will be signed.

APPENDIX "L"

(Filed: January 30, 1987)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION UNION COUNTY

Docket No. L-14573-79

CIVIL ACTION

JOHN R. CONNOR, et al., Plaintiff, vs. R. G. SACHS, M.D., et al., Defendants.	ORDER DENYING DISMISSAL

The matter having been brought before the Court on motion of Shanley & Fisher, P.C. attorney(s) for defendants Sachs, Inglesby, Belladonna, Murray & Wittman for an Order to dismiss the Complaint with prejudice,

and the Court having considered the matter and no good cause appearing,

It is on this 30th day of January, 1987, ORDERED that the request that the Complaint filed herein as against the defendants Sachs, Inglesby, Belladonna, Murray & Wittman be and

the same is hereby denied, because (1) plaintiff has met the time limits set forth in the Appellate Division opinion filed May 29, 1986 because the time limits therein were tolled by the pendency of the appeal to the New Jersey Supreme Court, dismissed on December 18, 1986; and (2) plaintiff's application for a further stay pending final decision on plaintiff's application to the U. S. Supreme Court has been granted.

A copy of this order shall be served within five (5) days of receipt on all interested parties.

/s/ Barbara Byrd Wecker...
BARBARA BYRD WECKER, J.S.C.

APPENDIX "M"

(Filed: January 30, 1987)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. L-14573-79

In the matter of:

JOHN R. CONNOR, etc.,	:	
	:	Civil Action
Plaintiff,	:	
	:	
v.	:	ORDER
	:	FOR STAY
R. G. SACHS, M.D., et als.,	:	
	:	
Defendants.	:	

The matter having been brought before the court on January 30, 1987 on the cross-motions of Plaintiff pro se, and the Court having considered the matters and good cause appearing:

1. It is on this 30th day of January, 1987 ORDERED that the within suit is stayed pending final disposition by the U. S. Supreme Court of plaintiff's constitutional challenge to N.J.S.A. 2A:31-2. No further action on plaintiff's cross-motions will be undertaken in light of the stay.

2. A copy of this Order shall be served on all parties within 5 days.

/s/ Barbara Byrd Wecker
BARBARA BYRD WECKER, J.S.C.

APPENDIX "N"

ORDER ON MOTION

(Filed: October 14, 1986)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3491-83T3
MOTION NO. M-426-86
BEFORE PART: G
JUDGE(S): FURMAN
PETRELLA
COHEN

JOHN R. CONNOR,

VS

R. G. SACHS, M.D., ET AL

MOTION FILED: September 12, 1986
ANSWER(S) FILED: _____ BY: _____
DATE SUBMITTED TO COURT: October 7, 1986

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 10 DAY OF October, 1986, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT JOHN CONNOR FOR STAY PENDING DISPOSITION OF PETITION FOR CERTIFICATION TO THE SUPREME COURT GRANTED

FOR THE COURT:

/s/ David D. Furman, P.J.A.D.
DAVID D. FURMAN, P.J.A.D.

APPENDIX "N"

(Filed: December 18, 1986)

SUPREME COURT OF NEW JERSEY
M-335 SEPTEMBER TERM 1986
M-336
26,036

JOHN R. CONNOR, etc.,	:	
	:	
Plaintiff-Movant,	:	
	:	
vs.	:	ORDER
	:	
R. G. SACHS, M.D., et al.,	:	
	:	
Defendants-Respondents.	:	

This matter having been duly presented to the Court, it is ORDERED that the motion for the recusal of Chief Justice Wilentz is denied (M-335); and it is further

ORDERED that the motion for stay is dismissed as moot (M-336).

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 16th day of December, 1986.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX "O"

JUDGMENT OF THE SUPERIOR COURT,
CHANCERY DIVISION, ESSEX COUNTY
Docket No. P-392-77
(Filed: May 26, 1978)

In the matter of

THE ESTATE

OF

MARY A. CONNOR, DECEASED.

Before:
DWYER, Chancery Judge.

DWYER, Chancery Judge:

It appearing by the complaint of Hannoch, Weisman, Stern & Besser, Esqs., that Mary A. Connor, late of the County of Essex and State of New Jersey, died on November 24, 1977, intestate; and it further appearing that due notice of the application of the plaintiff has been given to all of the competent adult

next of kin entitled to administration upon the estate of the said intestate, whose right thereto is prior or equal to that of the plaintiff.

It is thereupon on this 25th day of May, 1978, adjudged that letters of administration upon the estate of the said Mary A. Connor be granted to George Warren, Esq., upon his giving bond to the Superior Court of New Jersey in the sum of $5,000.00, conditioned according to law, and with sureties to be approved by this court which amount shall be received upon the filing of the inventory.

/s/ Arthur C. Dwyer
ARTHUR C. DWYER, J.S.C.

APPENDIX "P"

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
ESSEX COUNTY
P-392-77
(Filed: Jul 20, 1978)

In the Matter of the Estate of MARY A. CONNOR, Deceased.	Civil Action LETTERS OF ADMINISTRATION

I, W. Lewis Bambrick, Clerk of the Superior Court of New Jersey, the same being a Court of Record, do hereby certify that by Judgment of the Superior Court of New Jersey, dated May 25, 1978, George Warren was appointed Administrator of the Estate of Mary A. Connor, deceased, late of the County of Essex. The said Administrator has filed his acceptance and duly qualified on July 19, 1978,
And on the 19th of July, 1978, was duly authorized to execute the said estate according to law, as reference to the file in this office will more fully and at large appear.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Trenton, this 20th day of July, 1978.

(SEAL)

/s/ W. Lewis Bambrick
Clerk

APPENDIX "Q"

(Filed: March 24, 1987)

IN THE SUPREME COURT OF NEW JERSEY
DOCKET NO. 26,036/A-3491-83T3

JOHN R. CONNOR,

Appellant,

v.

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N. L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that John R. Connor, the Appellant above named, hereby appeals to the Supreme Court of the United States from the Final Order entered in this action on December 18, 1986, dismissing Appellant's appeal of the Final Judgment of the Appellate Division of the Superior Court of New Jersey,

and becoming final upon the entry of an Order Denying the Motion for Reconsideration entered on January 26, 1987 by the Supreme Court of New Jersey.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ John R. Connor
JOHN R. CONNOR, Pro se
380 Wyoming Avenue
Millburn, New Jersey 07041
(201) 762-5587

Dated: 24 March, 1987

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States was mailed by me this 24th day of March, 1987, via first-class mail, to: JAMES J. CIANCIA, Esq., Assistant Attorney General for the State of New Jersey, Office of the Attorney General, Hughes Justice Complex, Trenton, New Jersey 08625; ROBERT J. LOGAN, Esq., McDonough, Murray & Korn, 555 Westfield Avenue, Westfield, New Jersey 07091 (attorney for defendant Overlook Hospital); and THOMAS J. ALWORTH, Esq., Shanley & Fisher, 131 Madison Avenue, Morristown, New Jersey 17960 (attorney for defendant physicians).

I have also caused to be filed this day a copy of this notice with the Clerk of the

Appellate Division, Superior Court of New Jersey, in Trenton, New Jersey 08625.

/s/ John R. Connor
JOHN R. CONNOR, Pro se

Dated: 24 March, 1987

No. 86-1727

Supreme Court, U.S.
FILED
MAY 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

JOHN R. CONNOR,

Plaintiff-Appellant,

vs.

R.G. SACKS, M.D., T.V. INGLESBY, M.D., J.A. BELLADONNA, M.D., N.L. MURRAY, M.D., C.J. WITTMANN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants-Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS PLAINTIFF'S APPEAL

McDONOUGH, MURRAY & KORN
A Professional Corporation
Attorneys for Defendant-Appellee
Overlook Hospital
555 Westfield Avenue
P.O. Box "O"
Westfield, New Jersey 07091
(201) 233-9040

5672
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DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

QUESTION PRESENTED

Whether plaintiff may appeal to the United States Supreme Court where jurisdiction is premised upon 28 U.S.C. § 1257(2); 28 U.S.C. § 1257(3) and 28 U.S.C. § 2103 where the order from which he appeals is neither final nor from the highest court of the state nor presents any constitutional question.

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I. This Court does not have jurisdiction over this appeal because the order from which plaintiff appeals is neither "final" nor is it from the highest court of the State of New Jersey. 11

II. This case presents no constitutional issue. The Appellate Division in its decision filed May 29, 1986 explicitly refused to address the "constitutional" issue presented by plaintiff. 14

III. This case presents no constitutional issue. Plaintiff's inability to prosecute this action results from his own refusal to abide by the law. 15

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No. 86-1727

In The

Supreme Court of the United States

October Term, 1986

JOHN R. CONNOR,

Plaintiff-Appellant,

vs.

R.G. SACKS, M.D., T.V. INGLESBY, M.D., J.A. BELLADONNA, M.D., N.L. MURRAY, M.D., C.J. WITTMANN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants-Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS PLAINTIFF'S APPEAL

STATEMENT OF JURISDICTION

This is a motion to dismiss appeal brought pursuant to Rule 16 subparts (a) and (b) of the Rules of the Supreme Court of the United States. Rule 16 provides in pertinent part:

> 1. Within 30 days after receipt of the jurisdictional statement . . .the appellee may file a motion to dismiss. . . .
>
> (a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules.

Jurisdiction is premised upon 28 U.S.C. § 1257(2); 28 U.S.C. § 1257(3) and 28 U.S.C § 2103. These sections require that the order being appealed be both final and from the highest court of the state. The order plaintiff appeals from is neither. This Court has no jurisdiction over this appeal.

Moreover, subsection (b) of Rule 16 provides that:

> The Court will receive a motion to dismiss an appeal from a state court on the ground that it did not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

The New Jersey Appellate Division in its decision filed May 29, 1986 explicitly refused to address the "constitutional" issue. Instead, it gave the plaintiff the opportunity to establish standing by substituting an estate administrator as party plaintiff or appointing plaintiff, Mr. Connor, as administrator *ad prosequendum*.

Further, the constitutional question plaintiff seeks to raise was not then nor is now properly raised because his willful non-compliance with a state statute which would have given him

standing to bring the wrongful death action as executor under a will, does not give rise to a constitutional question.

Defendant-appellee Overlook Hospital, therefore, brings this motion to dismiss plaintiff-appellant's appeal.

STATUTES AND COURT RULES INVOLVED

N.J.S.A. 2A:31-2. Persons Entitled to Sue or Make Claim provides:

> Every action commenced under this chapter shall be brought in the name of an administrator ad prosequendum of the decedent for whose death damages are sought, except where decedent dies testate and his will is probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the case may be, shall bring the action.

N.J.S.A. 3B:10-23. Duty of Personal Representative to Settle and Distribute Estate provides:

> A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effected will and applicable law, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by law, the terms of the will, if any, and any order in proceedings to which he is a party for the best interests of successors to the estate.

N.J.S.A. 3B:3-29. Order to Compel Production of Purported Will provides:

> The Superior Court shall have jurisdiction to compel discovery as to the existence or whereabouts of any paper purporting to be a will of any decedent who died a resident of the county, which has not been offered for probate, and to require the paper to be lodged with the surrogate of the county for probate.

New Jersey Court Rule 2:2-1. Appeals to the Supreme Court from Final Judgments provides:

> (a) As of Right. Appeals may be taken to the Supreme Court from final judgments as of right: (1) in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State; (2) in cases where, and with regard to those issues as to which, there is a dissent in the Appellate Division; (3) directly from the trial courts in cases where the death penalty has been imposed and in post-conviction proceedings in such cases; (4) in such cases as are provided by law.
>
> (b) On Certification. Appeals may be taken to the Supreme Court from final judgments on certification to the Appellate Division pursuant to R. 2:12.

New Jersey Court Rule 2:2-2. Appeals to the Supreme Court from Interlocutory Orders provides:

> Appeals may be taken to the Supreme Court

by its leave from interlocutory orders:

(a) Of trial courts in cases where the death penalty has been imposed.

(b) Of the Appellate Division when necessary to prevent irreparable injury;

(c) On certification by the Supreme Court to the Appellate Division pursuant to R. 2:12-1.

New Jersey Court Rule 2:2-3. Appeals to the Appellate Division from Final Judgments, Decisions, Actions and from Rules; Tax Court provides:

(a) As of Right. Except as otherwise provided by R. 2:2-1(a)(3) (final judgments appealable directly to the Supreme Court), appeals may be taken to the Appellate Division as of right

(1) from final judgments of the Superior Court trial divisions, or the judges thereof sitting as statutory agents; the Tax Court; and in summary contempt proceedings in all trial courts except municipal courts;

(2) to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer excepting matters prescribed by R. 8:2 (tax matters) and matters governed by R. 4:74-8 (Wage Collection Section appeals), except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or

officer, unless the interest of justice requires otherwise;

(3) in such cases as are provided by law.

Final judgments of a court, for appeal purposes, shall also include those referred to by R. 4:42-2 (certification of interlocutory order), R. 5:8-6 (final custody determination in bifurcated matrimonial action), R. 5:10-6 (order on preliminary hearing in adoption action).

(b) By Leave. On application made pursuant to R. 2:5-6, appeals may be taken to the Appellate Division by leave granted, in extraordinary cases and in the interest of justice, from final judgments of a court of limited jurisdiction or from actions or decisions of an administrative agency or officer if the matter is appealable or reviewable as of right in a trial division of the Superior Court, as where the jurisdiction of the court, agency or officer is questioned on substantial grounds.

New Jersey Court Rule 2:2-4. Appeals to the Appellate Division from Interlocutory Orders, Decisions or Actions provides:

Except as otherwise provided by R. 3:28, the Appellate Division may grant leave to appeal, in the interest of justice, from an interlocutory order of a court or of a judge sitting as a statutory agent, or from an interlocutory decision or action of a state administrative agency or officer, if the final judgment, decision or action thereof is appealable as of right pursuant to R. 2:2-3(a), but no such

> appeal shall be allowed in cases referred to in R. 2:2-2(a).

New Jersey Court Rule 2:2-5. Consequences of Certain Appellate Division Judgments provides:

> A judgment of the Appellate Division on an appeal to it from an interlocutory order, decision or action shall be deemed to be interlocutory and not appealable to the Supreme Court as a final judgment, unless the judgment of the Appellate Division is dispositive of the action.

New Jersey Court Rule 4:46-2. Motion and Proceedings Thereon provides in pertinent part:

> . . . A summary judgment or order, interlocutory in character may be rendered on any issue in the action (including the issue of liability) although there is a genuine factual dispute as to any other issue (including any issue as to the amount of damages). Subject to the provisions of R. 4:42-2 (judgment upon multiple claims), a summary judgment final in character may be rendered in respect of any portion of the damages claimed.

New Jersey Court Rule 4:42-2. Judgment Upon Multiple Claims provides in pertinent part:

> . . . any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

STATEMENT OF THE CASE

Mary A. Connor, the mother of the plaintiff-appellant John R. Connor (hereinafter plaintiff), died in Overlook Hospital, Summit, New Jersey on November 24, 1977.

Although the history of the attempts to settle the estate of the late Mary A. Connor are complex, there are relatively few facts which the Court need consider in deciding this motion to dismiss the plaintiff's appeal.

Plaintiff John R. Connor was named executor in a will executed by the late Mrs. Connor. Although Mr. Connor was in possession of the late Mrs. Connor's will, he declined to offer the will for probate, as mandated by a New Jersey statute.

On application of a creditor, the Chancery Division, Essex County, New Jersey entered judgment on May 25, 1978, granting letters of administration to attorney George Warren (Plaintiff's Appendix O at 28a-92a).

When it became apparent to the court that Mr. Connor was in possession of what appeared to be a valid will, further proceedings were undertaken which resulted in a judgment entered December 3, 1979, appointing Mr. Warren as administrator with the will annexed and reciting that this appointment was made notwithstanding the designation of Mr. Connor as executor in the will (Defendant's Appendix A, *infra,* 1a).

Mr. Connor, during the time that Mr. Warren was acting as administrator of the estate, filed a complaint for wrongful death, in the purported capacity of, "beneficiary and executor-designate of the Estate of Mary A. Connor." (Defendant's Appendix B, 4a).

By motion originally returnable May 30, 1980, defendant-

appellee Overlook Hospital (hereinafter defendant), moved for a dismissal of the complaint on the ground that the applicable statute N.J.S.A. 2A:31-2 provided that only an executor, administrator *ad prosequendum*, or executor with a will annexed, had standing to file a suit for wrongful death (Defendant's Appendix C, 16a). By order dated July 31, 1980, however, all proceedings in the death action were stayed (Defendant's Appendix D, 21a).

The motion was eventually denied without prejudice by the court on January 23, 1981, pending the resolution of various appeals filed by Mr. Connor in the probate proceedings. The motion to dismiss was refiled by defendant physicians and ultimately, on February 10, 1984, the court granted the motion and entered an order dismissing Mr. Connor's wrongful death complaint for lack of standing as to all defendants (Plaintiff's Appendix E at 9a-10a). An appeal followed.

The New Jersey Appellate Division reversed by opinion of May 29, 1986 (Plaintiff's Appendix D at 4a-8a). It remanded the case providing the plaintiff with the opportunity to establish standing within thirty days. Plaintiff refused to avail himself of this opportunity after the Appellate Division denied his motion for reconsideration (Plaintiff's Appendix C at 3a). He then filed an appeal to the New Jersey Supreme Court arguing the constitutional invalidity of N.J.S.A. 2A:31-2 (Defendant's Appendix E, 23a). The New Jersey Supreme Court dismissed the appeal pursuant to defendant physicians' motion brought on the grounds that the appeal was improper and that the plaintiff should have petitioned for certification (Plaintiff's Appendix B at 2a). The New Jersey Supreme Court denied appellant's subsequent motion for reconsideration by order filed January 26, 1987 (Plaintiff's Appendix A at 1a).

Thus the New Jersey Supreme Court never considered any

substantive issue raised by plaintiff. While plaintiff contends he is appealing an order of the New Jersey Supreme Court, that "order" is nothing more than the court's acknowledgment that it did not have jurisdiction over the appeal as plaintiff had no appeal as of right but should have filed for certification.

Long after the time for plaintiff to comply with the Appellate Division's order expired, the defendant Overlook Hospital brought a motion for summary judgment on two grounds. The first was plaintiff's failure to comply with the Appellate Division's order and the second was that the plaintiff failed to make a *prima facie* case of malpractice against the hospital (Defendant's Appendix F, 26a). Judge Sachar of the Superior Court of New Jersey, Law Division, Union County, granted the motion and entered the order dismissing the plaintiff's complaint as to Overlook Hospital *only*, on September 12, 1986 (Plaintiff's Appendix J at 18a-19a). The case continued against the defendant physicians.

Plaintiff appealed Judge Sachar's order to the Appellate Division. The appeal was dismissed by order entered March 5, 1987 on the grounds that the appeal was interlocutory (Defendant's Appendix G, 36a). That is where the case ended as to defendant Overlook Hospital.[1]

Plaintiff is essentially appealing the Appellate Division's interlocutory order entered May 29, 1986, in which the court specifically refused to address the constitutional challenge raised by plaintiff.

---

1. In view of the complexity of the procedural history of this case, it is hoped that the graphic representation included in Appendix H (38a) will clarify the two courses of appeals.

ARGUMENT

I.

THIS COURT DOES NOT HAVE JURISDICTION OVER THIS APPEAL BECAUSE THE ORDER FROM WHICH PLAINTIFF APPEALS IS NEITHER "FINAL" NOR IS IT FROM THE HIGHEST COURT OF THE STATE OF NEW JERSEY.

Appellant invokes the jurisdiction of this Court under 28 U.S.C. § 1257(2) which provides that:

> Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The order from which the plaintiff ostensibly appeals is the New Jersey Supreme Court's order entered January 1, 1987 denying reconsideration of its order of December 16, 1986 dismissing the plaintiff's appeal of the Appellate Division's order filed July 1, 1986 denying reconsideration of its order filed May 29, 1986. In essence, the plaintiff is appealing the Appellate Division's interlocutory order of May 29, 1986. The Appellate Division's order of May 29, 1986 reversed the trial court's dismissal of plaintiff's wrongful death action for lack of standing. Instead, the court gave the plaintiff 30 days to establish his standing to bring this wrongful death action by requesting that the current administrator of the estate, Mr. Phillips, substitute as party

plaintiff and to maintain this wrongful death action and to provide a further opportunity if Phillips refused, to join Phillips as a party defendant in order to compel his substitution as plaintiff or, to appoint the plaintiff himself as administrator *ad prosequendum*.

Plaintiff refused to comply with the Appellate Division's order granting him this more-than-generous opportunity to establish his standing to bring the wrongful death action well after the time period for plaintiff to establish his standing expired.

Instead, on September 12, 1986 the plaintiff brought a motion for stay of the judgment (an erroneous designation as it was an order not a judgment) of May 29, 1986 on the grounds he was appealing this decision to the New Jersey Supreme Court. The motion was granted on October 10, 1986 (Plaintiff's Appendix N at 26a). Plaintiff was actually appealing a decision which was favorable to him but with which he didn't care to comply. In October of 1986, Shanley and Fisher, counsel for Dr. Sachs, Inglesby, Belladonna, Murray and Wittmann, filed a motion in the New Jersey Supreme Court to dismiss plaintiff's appeal to the Supreme Court. Plaintiff filed opposition to the motion on October 20, 1986. On December 16, 1986 the New Jersey Supreme Court granted defendant's motion to dismiss the plaintiff's appeal to the New Jersey Supreme Court (Plaintiff's Appendix A at 1a). Neither New Jersey Court Rule 2:2-1 concerning appeals from final judgments nor Rule 2:2-2 regarding appeals to the Supreme Court from interlocutory orders provide for the court to consider the plaintiff's appeal as it was presented. New Jersey procedure provides that "A judgment of the Appellate Division on an appeal to it from an interlocutory order shall be deemed to be interlocutory and not appealable to the Supreme Court as a final judgment, unless the judgment of the Appellate Division is dispositive of the action." N.J. Court Rules 2:2-5.

On January 21, 1987 the New Jersey Supreme Court denied

plaintiff's motion for reconsideration of their order of December 16, 1986 dismissing the plaintiff's appeal (Plaintiff's Appendix B at 2a). The New Jersey Supreme Court's dismissal of plaintiff's motion for reconsideration and their dismissal of plaintiff's appeal was based upon procedural grounds. The appeal was not properly before the New Jersey Supreme Court, and was dismissed on that basis. It is the New Jersey Supreme Court's refusal to hear plaintiff's appeal of the Appellate Division's interlocutory order which he presently appeals to the United States Supreme Court (Defendant's Appendix H, 38a). Simultaneously, defendant Overlook Hospital *only* brought a motion to dismiss plaintiff's complaint for plaintiff's failure to comply with the Appellate Division's order (Defendant's Appendix F, 26a). Judge Sachar of the Superior Court, Law Division, granted the motion and entered the order dismissing plaintiff's complaint as to defendant Overlook Hospital only, on September 12, 1986 (Plaintiff's Appendix J at 18a-19a). New Jersey law is clear that where the complaint is dismissed as to one defendant only, the plaintiff may continue as to the other defendants and the order of dismissal is interlocutory only. N.J. Court Rules 4:46-2 and 4:42-2; *Ford v. Weisman,* 188 N.J. Super. 614 (App. Div. 1983).

Plaintiff appealed Judge Sachar's order. This notice of appeal was dismissed on the grounds that it was taken from an interlocutory order (Defendant's Appendix G, 36a). Under New Jersey procedure, appeals to the Appellate Division may only be taken from final judgments. N.J. Court Rule 2:2-3. To appeal from interlocutory orders, New Jersey practice provides that a party move for leave to appeal to the Appellate Division. Pursuant to N.J. Court Rule 2:2-4.

In *Henderson v. Morristown Memorial Hospital,* 198 N.J. Super. 418, 426, 427 (App. Div. 1985), the court held that judgments are not final which leave issues for determination and do not dispose of all issues to all parties. Further, judgments which

are interlocutory are not appealable as a matter of right. *Citing* R. 2:2-3(a)(1). Instead, application for leave to appeal must be made. Where such ill-advised appeals are taken in the first instance the respondents have a responsibility to the appellate court to file a timely motion to dismiss the appeal. This defendant did in filing the motion to dismiss plaintiff's appeal of Judge Sachar's order.

The case against defendant Overlook Hospital ended with Judge Furman's order entered March 5, 1987 dismissing plaintiff's appeal (Defendant's Appendix H, 38a).

II.

THIS CASE PRESENTS NO CONSTITUTIONAL ISSUE. THE APPELLATE DIVISION IN ITS DECISION FILED MAY 29, 1986 EXPLICITLY REFUSED TO ADDRESS THE "CONSTITUTIONAL" ISSUE PRESENTED BY PLAINTIFF.

As set forth, *infra,* the plaintiff appealed from the dismissal on motion of his wrongful death action and from the denial of his cross-motion to declare N.J.S.A. 2A:31-2 unconstitutional or alternatively, to substitute Lucas E. Phillips, Jr., administrator of his mother's estate, as party plaintiff.

The Appellate Division by order of May 29, 1986 reversed the dismissal and remanded the case to the trial court explicitly refusing to address the constitutional issue raised by the plaintiff's cross-motion. The court said:

> We need not reach the constitutional issue raised by plaintiff that N.J.S.A. 2A:31-2 violates equal protection of the law because of its differing standards for who may bring claims on behalf of testate and intestate estates . . . .

(Plaintiff's Appendix D at 6a).

Instead the court reversed the dismissal to:

> [P]rovide an opportunity to plaintiff, within 30 days of the date of our remand, to request Phillips to substitute as party plaintiff and to maintain the wrongful death action and to provide a further opportunity if Phillips refuses, within 30 days thereafter, to join Phillips as a party defendant in order to compel his substitution as plaintiff or, alternatively, to appoint the present plaintiff as administrator *ad prosequendum*.

(Plaintiff's Appendix D at 7a).

Pursuant to Rule 16(b), a ground for dismissal of the appeal is that "it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate nonfederal basis." In the case at bar it is clear that the question of the constitutionality of N.J.S.A. 2A:31-2 was not properly raised by the plaintiff and was not expressly passed on by the Appellate Division.

III.

THIS CASE PRESENTS NO CONSTITUTIONAL ISSUE. PLAINTIFF'S INABILITY TO PROSECUTE THIS ACTION RESULTS FROM HIS OWN REFUSAL TO ABIDE BY THE LAW.

Mr. Connor was named executor of his mother's will. As executor, he was under an obligation imposed by N.J.S.A. 3A:2A-5 (now 3B:10-23) to act in the best interests of the estate

and settle the estate expeditiously and efficiently. He was further under an obligation imposed by N.J.S.A. 3A:3-23 (now 3B:3-29) to produce for probate any will of which he was aware.

Because Mr. Connor declined to abide by these statutes, the Chancery Division in Essex County, New Jersey on May 25, 1978, appointed an administrator for the estate. This appointment was appealed to the Appellate Division, and the Chancery Division's action was affirmed in the court's opinion of September 24, 1979.

When, through the efforts of the administrator, a will was ultimately produced, the Chancery Division entered a further order appointing the administrator as an administrator with the will annexed and further finding that Mr. Connor, by virtue of his prior actions, was unfit to serve as executor. Attempts on the part of plaintiff to have this order reversed on appeal have proven unavailing.

While the issue of plaintiff's right to delay admitting the will into probate was being litigated, the statute of limitations for wrongful death expired. Plaintiff does not dispute that, when the statute ran, he was not the duly qualified executor of the estate. He further concedes that there was at the time an administrator *c.t.a.* in existence and that this person was vested with the right to file an action for wrongful death. Nowhere in plaintiff's Jurisdictional Statement is it argued that he was somehow prevented from qualifying as executor. Indeed, it appears from the orders of the Chancery Division that plaintiff was given several opportunities over a period of years to do that which he was obligated to do by statute. Furthermore, it is beyond dispute that, had plaintiff complied with the law, he would have qualified as executor and would have been in a position to file a wrongful death action if he chose.

Thus, it is not N.J.S.A. 2A:31-2 which has prevented plaintiff

from prosecuting the action, it is plaintiff's own willful failure to comply with his legal obligations which has resulted in the present situation.

An analogous issue was addressed by the Supreme Court in *Corbitt v. New Jersey,* 439 U.S. 212, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978). There, a defendant was charged with first degree murder in New Jersey. The statute then in force provided that while pleas of guilty to first degree murder were not acceptable, a plea of *non-vult* or *nolo contendere* could be accepted. If plaintiff were convicted of first degree murder, the statute provided for mandatory life sentence. If plaintiff were to plead, the court was vested with discretion to sentence plaintiff either to life or to the penalty for second degree murder. Defendant chose to go to trial, was convicted and sentenced to life imprisonment. On appeal, defendant argued that the statute providing for a lesser penalty in the event of a plea was violative of the Equal Protection Clause of the Fourteenth Amendment, since it was designed to penalize persons who chose to exercise their right to a trial. In essence, the defendant's position was that, had he known in advance what the outcome of his trial would have been, he would have chosen to plead and argue for the lesser sentence.

Holding New Jersey's statutory scheme constitutional, Justice White, for the court, remarked that equal protection does not free those who have made a bad assessment of risks or a bad choice from the consequences of their decision. 439 U.S. at 226.

This reasoning applies with equal force to the contention presented by plaintiff in this case. Certainly, there has been no showing of "invidious discrimination" such as is proscribed by the Fourteenth Amendment and no showing that there exists here anything more than a mere inequality or difference in treatment, not constitutionally prohibited, *Dandridge v. Williams,* 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970). Absent any showing

of such invidious discrimination, the legislative structure of the wrongful death statute must be upheld, *Morey v. Doud*, 354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957).

Plaintiff here, like the defendant in *Corbitt*, has made what hindsight has shown to be a bad decision. It is not the function of the Constitution to free citizens from the consequences of their willful disregard of the law, and plaintiff herein is entitled to no relief.

CONCLUSION

For the reasons set forth, this Court does not have jurisdiction of this appeal and defendant's motion to dismiss should therefore be granted.

Respectfully submitted,

JAY SCOTT MacNEILL
Attorney for Appellee
Overlook Hospital

ROCHELLE GIZINSKI
On the Brief

APPENDIX A—JUDGMENT OF DECEMBER 3, 1979 GRANTING LETTERS TO GEORGE WARREN

HANNOCH, WEISMAN, STERN & BESSER
A PROFESSIONAL CORPORATION
744 BROAD STREET
NEWARK, NEW JERSEY 07102
(201) 621-8800
Plaintiff Pro se

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION — ESSEX COUNTY
DOCKET NO. P-392-77

Civil Action

In the Matter of the Estate

of

MARY A. CONNOR, Deceased

JUDGMENT GRANTING PROBATE AND LETTER OF ADMINISTRATION WITH THE WILL ANNEXED

This matter coming before the Court on November 14, 1979, the return date of an Order to Show Cause of George Warren, Esq., Administrator of the Estate of Mary A. Connor for probate of the Will of Mary A. Connor and in the presence of the Administrator pro se (George Warren, Esq. appearing) and several creditors of Mary A. Connor: namely, Hannoch, Weisman, Stern & Besser, P.A., plaintiff pro se (Irwin P. Burzynski, Esq. appearing; Milton, Keane & Brady pro se and attorneys for Fred Blackwell (John B. O'Neill, Esq. appearing); Fred Blackwell, Esq. appearing; and the Beneficiaries of the Estate of Mary Ellen Flynn (John Anthony Lombardi, Esq. appearing).

Appendix A

And the Court having read the Petition, Answers, Claims, Certification and Memorandum of Law in connection herewith including the transcript of proceedings in this action of September 26, 1979,

And the Court having inquired into the circumstances and taken proof, and being satisfied as to the genuineness of the Will, the validity of its execution and the competency of the testatrix, and it further appearing that testatrix died on November 24, 1977, and that no caveat has been filed against the probate of said Will, and for good cause shown,

It is on this 3 day of December, 1979,

ORDERED and ADJUDGED that the instrument offered for probate in this matter be and it is hereby established as the last will of Mary A. Connor, deceased, and it be and hereby is admitted to probate; and it is further

ORDERED that due to the conduct of John R. Connor in this action as set forth on the record herein, and notwithstanding the designation of the testatrix of John R. Connor as Executor, the Court will appoint someone else to act as fiduciary for the Estate of Mary A. Connor; and it is further

ORDERED that upon notice to all parties in interest, letters of Administration with the will annexed upon the Estate of Mary A. Connor be granted to Lucas E. Phillips, Jr., Esq. of 18 Beaver Street, Newark, New Jersey 07102, telephone number (201) 624-0600, upon his giving bond to the Superior Court of New Jersey in the sum of $25,000, conditioned according to law, and with sureties to be approved by this Court; and it is further

ORDERED that George Warren, Esq. may hereby withdraw

Appendix A

as Administrator of the Estate of Mary A. Connor and that he is to present his final account, together with any requests for fees and disbursements, to the Court on December 7, 1979, at 9:00 in the forenoon, whereupon he may be discharged as Administrator of the Estate of Mary A. Connor.

s/ Geoffrey Gaulkin
Geoffrey Gaulkin, J. S. C.

APPENDIX B—PLAINTIFF'S WRONGFUL DEATH COMPLAINT FILED NOVEMBER 21, 1979

John R. Connor, *Pro se*
380 Wyoming Avenue
Millburn, New Jersey 07041
(201) 762-5587

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : UNION COUNTY
DOCKET NO. MM

Civil Action

In the matter of

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiffs,

-vs-

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants.

COMPLAINT: WRONGFUL DEATH (N.J.S.A. 2A:31 *et seq.*)
AND JURY DEMAND

Appendix B

The Plaintiff, John R. Connor, residing at 380 Wyoming Avenue, Millburn, New Jersey, complaining of the defendants, says that:

FIRST COUNT

1. On or about August 16, 1977 decedent Mary A. Connor developed symptoms of atrial fibrillation and conjestive heart failure for which she was admitted, by N. L. Murray, M.D., to Overlook Hospital, Summit, New Jersey on September 13, 1977, and came under the care of the defendant, R. G. SACHS, M.D.

2. The defendant, R. G. SACHS, M.D., on, before and after September 13, 1977 was a practicing physician (cardiologist) holding himself out to the public and to the decedent as being skilled, careful and diligent in the practice of his profession.

3. The defendant, R. G. SACHS, M.D., attended and cared for decedent Mary A. Connor on or about September 13, 1977 and during the time of her succeeding periods of hospitalization at Overlook Hospital, to wit: September 13 - October 5, 1977; October 29 - November 11, 1977; and November 21 - 24, 1977.

4. After decedent Mary A. Connor was discharged from Overlook Hospital on October 5, 1977 and November 11, 1977, and while she was at home, the defendant, R. G. SACHS, M.D., continued to care for and to treat decedent at his office and at decedent's home by telephone. During this time decedent Mary A. Connor and her son, John R. Connor, on her behalf, made numerous complaints to the defendant of nausea, leg pain, gastrointestinal disturbance and abdominal pain. Said complaints were made over a period of approximately six weeks until November 20, 1977.

Appendix B

5. The defendant, R. G. SACHS, M.D., undertook to treat and care for decedent Mary A. Connor beginning on or about September 13, 1977 and thereafter until November 24, 1977. It was the duty of the defendant, R. G. SACHS, M.D., to exercise such reasonable skill and care as is usually required by physicians (cardiologists) under similar circumstances and in similar places in making all diagnoses, examinations, operations, tests and treatments preoperatively and postoperatively and not to abandon or neglect the patient in any respect.

6. Notwithstanding the duty imposed on the defendant, R. G. SACHS, M.D., as aforesaid, the defendant, well knowing his duty to the decedent, did wilfully and negligently fail to exercise reasonable skill and care as is usually exercised by physicians (cardiologists) in similar circumstances and in similar places in the following particulars:

a. The defendant, R. G. SACHS, M.D., wilfully and negligently failed to exercise reasonable skill and care when he failed to properly treat decedent's numerous complaints of nausea, leg pain, gastrointestinal disturbance and abdominal pain and wilfully concealed from decedent her medical condition of "aortic stenosis."

b. The defendant, R. G. SACHS, M.D., failed to exercise reasonable skill and care when he administered the drug "Norpace" to decedent Mary A. Connor on September 16, 1977, which administration nearly caused the death of Mary A. Connor on September 17, 1977.

c. The defendant, R. G. SACHS, M.D., wilfully failed to inform the decedent or her family of the true and correct results of decedent's left-heart catheterization on September 30, 1977.

Appendix B

d. The defendant, R. G. SACHS, M.D., negligently failed to test decedent for "aortic stenosis" at an earlier period of time, when decedent's chances of surviving such surgery would have been greater.

e. The defendant, R. G. SACHS, M.D., failed to exercise reasonable skill and care when he wilfully and negligently prescribed the drug "Digoxin" to decedent Mary A. Connor during the months of October and November, 1977, after Mary A. Connor had received a pacemaker.

f. The defendant, R. G. SACHS, M.D., failed to exercise reasonable skill and care when he negligently failed to diagnose and treat decedent Mary A. Connor for pancreatitis at Overlook Hospital in the period from November 21 - 23, 1977.

g. The defendant, R. G. SACHS, M.D., failed to exercise reasonable skill and care in negligently failing to diagnose the drug "Demerol" as the cause for the drop in decedent's blood pressure on the morning of November 23, 1977.

h. The defendant, R. G. SACHS, M.D., failed to exercise reasonable skill and care on November 23, 1977 when he decided to operate on Mary A. Connor without sufficient cause and without correctly diagnosing the cause of decedent's abdominal pain.

i. The defendant, R. G. SACHS, M.D., was otherwise wilfully negligent in failing to secure the "informed consent" of decedent's husband, Thomas B. Connor, Sr., for the exploratory surgery on November 23, 1977.

j. The defendant, R. G. SACHS, M.D., was otherwise

negligent and failed to exercise reasonable skill and care in the treatment of decedent Mary A. Connor and was otherwise negligent in failing to properly treat decedent postoperatively.

7. As a result of the grossly negligent and wrongful and wilfully negligent acts on the part of defendant, R. G. SACHS, M.D., as aforesaid, Mary A. Connor died in Overlook Hospital on November 24, 1977.

WHEREFORE, Plaintiff demands judgment on this count against the defendant, R. G. SACHS, M.D., for compensatory and punitive damages and costs.

SECOND COUNT

1. Plaintiff repeats the allegations of the First Count and makes them Paragraph #1 of this count.

2. The defendant, T. V. INGLESBY, M.D., on, before and after September 13, 1977 was a practicing physician (cardiologist) holding himself out to the public and to the decedent Mary A. Connor as being skilled, careful and diligent in the practice of his profession.

3. The defendant, T. V. INGLESBY, M.D., undertook to treat and care for the decedent Mary A. Connor at various times during her hospitalizations at Overlook Hospital. It was the duty of the defendant, T. V. INGLESBY, M.D., to exercise such reasonable skill and care as is usually required by physicians (cardiologists) under similar circumstances and in similar places in making all diagnoses, examinations, operations, tests and treatments preoperatively and postoperatively and not to abandon or neglect the patient in any respect.

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4. Notwithstanding the duty imposed on the defendant, T. V. INGLESBY, M.D., as aforesaid, and the defendant well knowing his duty to the decedent, he did, negligently fail to exercise reasonable skill and care as is usually exercised by physicians (cardiologists) in similar circumstances and in similar places in the following particulars:

a. The defendant, T. V. INGLESBY, M.D., failed to exercise reasonable skill and care when he negligently failed to inform decedent Mary A. Connor, or her family of the true and correct results of her left-heart catheterization on September 30, 1977.

b. The defendant, T. V. INGLESBY, M.D., failed to exercise reasonable skill and care when he negligently failed to resolve decedent's medication problems subsequent to his agreement with plaintiff to do so on October 29, 1977.

c. The defendant, T. V. INGLESBY, M.D., was otherwise negligent and he failed to exercise reasonable skill and care in the treatment of Mary A. Connor.

5. As a result of the negligent acts on the part of the defendant, T. V. INGLESBY, M.D., as aforesaid, Mary A. Connor died in Overlook Hospital on November 24, 1977.

WHEREFORE, Plaintiff demands judgment on this count against the defendant, T. V. INGLESBY, M.D., for compensatory damages and costs.

THIRD COUNT

1. Plaintiff repeats the allegations of the First and Second Counts and makes them Paragraph #1 of this count.

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2. The defendant, J. A. BELLADONNA, M.D., was and is a physician (gastroenterologist) holding himself out to the public and the decedent as being skilled, careful and diligent in the practice of his profession.

3. After decedent Mary A. Connor was admitted to Overlook Hospital on November 21, 1977, the defendant, J. A. BELLADONNA, M.D., examined decedent Mary A. Connor to discover the cause of her abdominal pain.

4. It was the duty of the defendant, J. A. BELLADONNA, M.D., to exercise such reasonable skill and care as is usually required by physicians (gastroenterologists) under similar circumstances and in similar places, in making all diagnoses, examinations, operations, tests and treatments preoperatively and postoperatively and not to abandon or neglect the patient in any respect.

5. Notwithstanding the duty imposed upon the defendant, J. A. BELLADONNA, M.D., as aforesaid, and the defendant well knowing his duty to the decedent, he did, negligently fail to exercise reasonable skill and care as is usually exercised by physicians (gastroenterologists) in similar circumstances and in similar places in the following particulars:

a. The defendant, J. A. BELLADONNA, M.D., failed to test for and diagnose pancreatitis as the cause of decedent Mary A. Connor's abdominal pain in the period from November 21 - 24, 1977 and advised exploratory surgery without sufficient cause.

b. The defendant, J. A. BELLADONNA, M.D., was otherwise negligent and failed to exercise reasonable skill and care in the treatment of decedent Mary A. Connor.

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6. As a result of the negligent and wrongful acts on the part of the defendant, J. A. BELLADONNA, M.D., as aforesaid, Mary A. Connor died in Overlook Hospital on November 24, 1977.

WHEREFORE, Plaintiff demands judgment against the defendant, J. A. BELLADONNA, M.D., for compensatory and punitive damages and costs.

FOURTH COUNT

1. Plaintiff repeats the allegations of the First, Second and Third Counts and makes them Paragraph #1 of this count.

2. The defendant, N. L. MURRAY, M.D., was, is and for a number of years prior to September 13, 1977 a physician holding himself out to the public and to the decedent as being skilled, careful and diligent in the practice of his profession.

3. The defendant, N. L. MURRAY, M.D., was, for a number of years prior to 1977, decedent Mary A. Connor's personal physician, being intimately familiar with her medical history, condition and problems. During this time and up until September 13, 1977, the defendant, N. L. MURRAY, M.D., undertook to treat and care for decedent, particularly in the period from August 16, 1977 to September 13, 1977.

4. It was the duty of the defendant, N. L. MURRAY, M.D., to exercise such reasonable skill and care as is usually exercised and required by physicians under similar circumstances and in similar places in making all diagnoses, examinations, operations, tests and treatments preoperatively and postoperatively and not to abandon or neglect the patient in any respect.

Appendix B

5. Notwithstanding the duty imposed on the defendant, N. L. MURRAY, M.D., as aforesaid, and the defendant well knowing his duty to the decedent, he did, negligently fail to exercise reasonable skill and care as is usually exercised by physicians in similar circumstances and in similar places in the following particulars:

a. The defendant, N. L. MURRAY, M.D., negligently failed to exercise reasonable skill and care when he abandoned his patient, Mary A. Connor, after September 13, 1977.

6. As a result of the negligent and wrongful acts on the part of the defendant, N. L. MURRAY, M.D., as aforesaid, Mary A. Connor died in Overlook Hospital on November 24, 1977.

WHEREFORE, Plaintiff demands judgment on this count against the defendant, N. L. MURRAY, M.D., for compensatory damages and costs.

FIFTH COUNT

1. Plaintiff repeats the allegations of the First, Second, Third and Fourth Counts and makes them Paragraph #1 of this count.

2. The defendant, C. J. WITTMAN, JR., M.D., was, is and for a number of years prior to November 23, 1977 a physician and surgeon holding himself out to the public as being skilled, careful and diligent in the practice of his profession.

3. Notwithstanding the duty imposed upon the defendant, C. J. WITTMAN, JR., M.D., as aforesaid, and the defendant well knowing his duty to decedent, Mary A. Connor, he did negligently and wilfully fail to exercise reasonable skill and care

as is usually exercised by physicians and surgeons in similar circumstances and in similar places in the following manner:

a. The defendant, C. J. WITTMAN, JR., M.D., performed an exploratory laparotomy on decedent Mary A. Connor on November 23, 1977, without sufficient cause, and re-opened said laparotomy, without sufficient cause, attempting subsequently to conceal said reopening from decedent's family.

4. As a result of the defendant C. J. WITTMAN, JR.'s gross negligence and wrongful and wilful negligence and conduct, as aforesaid, Mary A. Connor died in Overlook Hospital on November 24, 1977.

WHEREFORE, Plaintiff demands judgment on this count against the defendant, C. J. WITTMAN, JR., M.D., for compensatory and punitive damages and costs.

SIXTH COUNT

1. Plaintiff repeats the allegations of the First, Second, Third, Fourth and Fifth Counts and makes them Paragraph #1 of this count.

2. The defendant, OVERLOOK HOSPITAL, was and is for a number of years prior to September 13, 1977 a private hospital located in the City of Summit, County of Union, State of New Jersey.

3. During the periods from September 13 - October 5, 1977, October 29 - November 11, 1977 and from November 21 - 24, 1977, decedent Mary A. Connor was a patient at said hospital for the treatment of medical problems hereinbefore set forth in Counts 1, 2, 3, 4 and 5.

Appendix B

4. It was the duty of the defendant, OVERLOOK HOSPITAL, to exercise such reasonable skill and care in the treatment of patients as is usually required of the staffs of private hospitals in similar circumstances and in similar places in the way of treatments preoperatively and postoperatively.

5. Notwithstanding the duty imposed on the defendant, OVERLOOK HOSPITAL, as aforesaid, and the defendant well knowing its duty to decedent Mary A. Connor, it did negligently fail to exercise reasonable skill and care as is usually exercised by the staffs of private hospitals in similar circumstances and in similar places in the following particulars:

a. The defendant, OVERLOOK HOSPITAL, failed to exercise reasonable skill and care in the treatment of decedent Mary A. Connor when she was hospitalized between November 21 - 24, 1977 by failing to perform gastric lavage on decedent and otherwise properly treat her symptoms of gastritis and pancreatitis.

b. The defendant, OVERLOOK HOSPITAL, wilfully attempted to cause an autopsy not to be performed on decedent Mary A. Connor on November 24, 1977.

c. The defendant, OVERLOOK HOSPITAL, was otherwise negligent in failing to properly treat decedent Mary A. Connor postoperatively on November 24, 1977.

6. As a result of the negligent and wrongful acts on the part of the defendant, OVERLOOK HOSPITAL, as aforesaid, Mary A. Connor died in Overlook Hospital on November 24, 1977.

WHEREFORE, Plaintiff demands judgment on this count

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against the defendant, OVERLOOK HOSPITAL, for compensatory and punitive damages and costs.

s/ John R. Connor
JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken.

20 November, 1979

PLAINTIFF DEMANDS THAT ALL ISSUES RAISED BY THIS PLEADING BE TRIED BY A JURY.

s/ John R. Connor
JOHN R. CONNOR

20 November, 1979

APPENDIX C—DEFENDANT OVERLOOK'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT RETURNABLE MAY 30, 1980

McDONOUGH, MURRAY & KORN
A Professional Corporation
555 Westfield Avenue
Westfield, New Jersey 07090
(201) 233-9040
Attorneys for defendant Overlook Hospital

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : UNION COUNTY
DOCKET NO. L-14573-79

CIVIL ACTION
(Medical Malpractice)

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiffs,

-vs-

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants.

NOTICE OF CROSS MOTION

Appendix C

MOVING PARTY: Overlook Hospital, defendant.

DATE OF MOTION: Friday, May 30, 1980 at 9 a.m.

PLACE: Union County Court House, Elizabeth, New Jersey.

PURPOSE: To dismiss plaintiff's Complaint for lack of standing.

SUPPORTING DOCUMENTS: Moving party will rely upon the annexed Memorandum of Law in support of this Motion.

CERTIFICATION: The original of this Notice of Motion has been filed with the Clerk of the Superior Court of New Jersey and a clear copy has been mailed to the Clerk of Union County, Thomas J. Alworth, Esq., and John R. Connor, *Pro Se*, by certified mail, return receipt requested.

McDONOUGH, MURRAY & KORN, P.A.
Attorneys for defendant Overlook Hospital

BY: s/ Robert J. Logan
Robert J. Logan

DATED: May 15, 1980

Appendix C

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : UNION COUNTY
DOCKET NO. L-14573-79

CIVIL ACTION
(Medical Malpractice)

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiffs,

-vs-

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT OVERLOOK HOSPITAL'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF STANDING

McDonough, Murray & Korn, PA
555 Westfield Avenue
Westfield, New Jersey 07090
(201) 233-9040
Attorneys for defendant
Overlook Hospital

Robert J. Logan, Esq.

Appendix C

STATEMENT OF FACTS

This is a medical malpractice action which alleges that the plaintiff's decedent died as a result of the negligence of the defendant Overlook Hospital and the various defendant physicians.

Plaintiff, John R. Connor has designated himself as the beneficiary and Executor-designate of the Estate of the decedent, Mary A. Connor. The caption of the Complaint further indicates that there are certain beneficiaries of the Estate of Mary A. Connor for whose benefit this action has been brought.

Plaintiff is neither the Administrator ad prosequendum nor the Executor of the decedent's Estate. Plaintiff is not an attorney at law admitted to practice in the State of New Jersey.

LEGAL ARGUMENT

By the terms of *N.J.S.A.* 2A:31-2, an action seeking recovery for wrongful death may be brought only by an Administrator ad Prosequendum, and Executor, or an Administrator with a will annexed. No other person is qualified by Statute to pursue such an action. The Statute is quite explicit and provides for no exceptions.

Plaintiff in the instant matter does not fit into any of the statutory categories. Plaintiff therefore lacks the necessary standing to bring the action.

Plaintiff further attempts to bring this action *Pro se*. The *Pro se* appearance of a non-lawyer Administrator or Executor in a wrongful death action is prohibited by *R.* 1:21-1. Sound

philosophy underlying this rule has been set out by the Appellate Division in *Kasharian v. Wilentz,* 93 N.J. Super. 479 (App. Div. 1967). There, the Court observed, "the philosophy of the decided cases is that nominal representatives or even active fiduciaries of the persons in beneficial interest, not themselves lawyers, should not be permitted to conduct legal proceedings in Court involving the rights or liabilities of such persons without representation by attorneys duly qualified to practice law," 93 N.J. Super. at 482.

Plaintiff is not entitled to bring the within action since he is not qualified under the wrongful death statute. In addition, plaintiff is attempting to represent persons other than himself. Since plaintiff is not an attorney admitted to practice in the State, such representation is prohibited.

For both these reasons, plaintiff completely lacks any standing to bring this action. The Complaint was a nullity at the time it was filed, and should be dismissed.

CONCLUSION

For the reasons advanced above, it is respectfully submitted that the Court should dismiss plaintiff's Complaint.

McDONOUGH, MURRAY & KORN, P.A.
Attorneys for defendant
Overlook Hospital

BY: s/ Robert J. Logan
Robert J. Logan

DATED: May 15, 1980

APPENDIX D—ORDER DATED JULY 31, 1980 STAYING PROCEEDINGS IN WRONGFUL DEATH ACTION

McDONOUGH, MURRAY & KORN
555 Westfield Avenue
Westfield, New Jersey 07090
(201) 233-9040
Attorneys for defendant Overlook Hospital

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : UNION COUNTY
DOCKET NO. L-14573-79

CIVIL ACTION
(Medical Malpractice)

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiffs,

-vs-

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants.

ORDER

JUDGE: Honorable James H. Coleman, Jr., J.S.C.

Appendix D

DATE OF MOTION: Friday, July 25, 1980.

PARTIES PRESENT OR REPRESENTED: John R. Connor, plaintiff pro se, Paul Nittoly, Esq. of Shanley & Fisher, Esqs., on behalf of the defendant doctors, and Robert J. Logan, Esq., of McDonough, Murray & Korn, Esqs., on behalf of the defendant Overlook Hospital.

ORDERED. All proceedings in the matter of *Connor vs. Sachs, et al.*, Docket No. L-14573-79 are stayed pending the resolution of a Petition for Rehearing presented to the Supreme Court of New Jersey in the matter of the *Estate of Mary A. Connor,* Docket No. 16,613.

FURTHER ORDERED: That John R. Connor shall promptly notify McDonough, Murray & Korn, Esqs., of the Supreme Court's disposition of the Petition for Rehearing.

s/ James H. Coleman, Jr.,
JAMES H. COLEMAN, JR.,
J.S.C.

DATE OF ORDER: July 31, 1980

APPENDIX E—PLAINTIFF'S AMENDED NOTICE OF APPEAL TO THE NEW JERSEY SUPREME COURT APPEALING APPELLATE DIVISION'S DECISION OF MAY 29, 1986

John R. Connor, *Pro se*
380 Wyoming Avenue
Millburn, New Jersey 07041
(201) 762-5587

SUPREME COURT OF NEW JERSEY
DOCKET NO.

Civil Action

In the matter of

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiffs,

-vs-

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMANN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants.

AMENDED NOTICE OF APPEAL ON APPEAL FROM APPELLATE DIVISION TO SUPREME COURT

Appendix E

TO: Robert J. Logan, Esq.
McDonough, Murray & Korn
555 Westfield Avenue
Westfield, New Jersey 07090

Thomas J. Alworth, Esq.
Shanley & Fisher
131 Madison Avenue
Morristown, New Jersey 07960

Information only:

Attorney General of New Jersey
Attn: James J. Ciancia, esq.
Office of the Attorney General
Hughes Justice Complex
Trenton, New Jersey 08625

NOTICE is hereby given that John R. Connor, *Pro se*, Appellant in the matter of *Connor v. Sachs, et al.*, Docket No. A-3491-83T3, hereby appeals to the Supreme Court of New Jersey from the Final Judgment of the Appellate Division of the Superior Court of New Jersey entered in this matter on May 29, 1986.

This appeal questions the validity of *N.J.S.A.* 2A:31-2 and is not entitled to a hearing preference pursuant to *R.* 1:2-5.

s/ John R. Connor
John R. Connor, *Pro se*

Dated: 3 August, 1986

Appendix E

Certificate of Service
and
Payment of Filing Fees

Appellant hereby certifies that he has today served a clear copy of this paper on all parties by mailing same, via first-class mail, to their attorneys as shown on the first page of this Notice; an informational copy has been served on the Attorney General of New Jersey and trial judge Harry V. Osborne, Jr., J.S.C., at the Court House in Elizabeth, New Jersey, by first-class mail. Appellant's original Notice of Appeal in this matter, dated July 23, 1986, was served on the same parties via first-class mail, on July 25, 1986, and on the Attorney General, on the same date, via first-class mail with a Certificate of Mailing.

Appellant further certifies that he has paid the filing fees for this appeal, in accordance with *N.J.S.A.* 22A:2.

s/ John R. Connor
John R. Connor, *Pro se*

Dated: 4th August, 1986

APPENDIX F—DEFENDANT HOSPITAL'S NOTICE OF MOTION AND BRIEF FOR SUMMARY JUDGMENT RETURNABLE SEPTEMBER 12, 1986

McDONOUGH, MURRAY & KORN, P.A.
A Professional Corporation
555 Westfield Avenue
P.O. Box "0"
Westfield, New Jersey 07091
(201) 233-9040
Attorneys for defendant, Overlook Hospital

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : UNION COUNTY
DOCKET NO. L-14573-79

CIVIL ACTION
(Medical Malpractice)

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiffs,

-vs-

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants.

Appendix F

NOTICE OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANT, OVERLOOK HOSPITAL, OR, IN THE ALTERNATIVE, TO DISMISS PLAINTIFFS' COMPLAINT

MOVING PARTY: Defendant, Overlook Hospital.

DATE OF MOTION: Friday, September 12, 1986, at 9:00 a.m.

PLACE: Union County Court House, Elizabeth, New Jersey.

PURPOSE: To apply for an Order granting summary judgment on behalf of the defendant, Overlook Hospital, or, in the alternative, to obtain an Order dismissing plaintiffs' Complaint.

SUPPORTING DOCUMENTS: Brief in support of Motion for Summary Judgment.

CERTIFICATION: The original of this Notice of Motion has been filed with the Clerk of the Superior Court, and a clear copy has been mailed to the Motions Clerk of Union County, Thomas J. Alworth, Esq., and John R. Connor, *Pro Se*, by Certified Mail, return receipt requested.

ORDER: Proposed form of Order is attached.

PRETRIAL CONF. DATE
CALENDAR CALL DATE:
TRIAL DATE: 9/15/86

Appendix F

McDONOUGH, MURRAY &
KORN, P.A.
A Professional Corporation

BY: s/ Susan McCarthy Moryan
Susan McCarthy Moryan

Dated: July 31, 1986

Appendix F

McDONOUGH, MURRAY & KORN, P.A.
A Professional Corporation
555 Westfield Avenue
P.O. Box "0"
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(201) 233-9040
Attorneys for defendant, Overlook Hospital

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : UNION COUNTY
DOCKET NO. L-14573-79

CIVIL ACTION
(Medical Malpractice)

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiffs,

-vs-

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants.

CERTIFICATION

James Caldas, by way of certification in lieu of affidavit, says:

Appendix F

1. I am the Executive Vice President and Chief Operating Officer of defendant, Overlook Hospital, in the above matter.

2. This action is a wrongful death action brough against Dr. R.G. Sachs, Dr. T.V. Inglesby, Dr. J.A. Belladonna, Dr. N.L. Murray, Dr. C.J. Wittman, Jr. and Overlook Hospital stemming from the death of Mary Connor at Overlook Hospital in November 1977.

3. The doctors mentioned in Paragraph 2 are not employees of Overlook Hospital. They are merely members of the hospital staff at Overlook Hospital with privileges to practice at this hospital.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

James Caldas

Dated:

Appendix F

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : UNION COUNTY
DOCKET NO. L-14573-79
CIVIL ACTION
(Medical Malpractice)

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiffs,

-vs-

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANT, OVERLOOK HOSPITAL

McDONOUGH, MURRAY & KORN, P.A.
A Professional Corporation
555 Westfield Avenue
P.O. Box "0"
Westfield, New Jersey 07091
(201) 233-9040
Attorneys for defendant, Overlook Hospital

On the Brief:
Susan McCarthy Moryan, Esq.

Appendix F

STATEMENT OF FACTS

This is a wrongful death action with a long history both in the trial and appellate courts. Plaintiff, acting *pro se*, filed a wrongful death Complaint on November 21, 1979. This Complaint alleges negligence on the part of the various individually named defendants and Overlook Hospital resulting in the death of plaintiff's mother on November 24, 1977. (See Exhibit "A".) The individual physician defendants were not employees of Overlook Hospital. (See Exhibit "B".) A series of motions, orders and appeals as to who was the proper party plaintiff to bring the wrongful death action thereafter followed since plaintiff, though named as the Executor of his mother's will, failed to qualify as Executor. Ultimately, on February 10, 1984, the trial court entered an Order dismissing plaintiff's Complaint since he was neither the Executor, Administrator *ad prosequendum* or Executor c.t.a. of his mother's estate and, therefore, had no standing to file the wrongful death action.

Plaintiff appealed from the trial court Order dismissing his Complaint and the Appellate Division rendered its decision on this appeal on May 29, 1986. (See Exhibit "C".) The Appellate Division reversed the dismissal of plaintiff's Complaint and remanded the matter to provide plaintiff an opportunity, within 30 days of the date of remand, to request Lucas Phillips, Esq. to substitute as party plaintiff and, if Phillips refuses, within 30 days thereafter, to join Phillips as a party defendant to compel his substitution or to appoint the present plaintiff as Administrator *ad prosequendum*. More than 60 days have expired since the Appellate Division's remand and none of the required action has been taken. Trial is now scheduled for September 15, 1986.

Furthermore, although plaintiff makes several allegations of

negligence against Overlook Hospital, he has never supplied any expert reports alleging deviations from accepted practice on the part of Overlook Hospital. For this reason, it is respectfully submitted that Overlook Hospital is entitled to summary judgment at this time. It is also submitted that plaintiff's failure to comply with the recent decision of the Appellate Division requires dismissal of his Complaint.

LEGAL ARGUMENT

Since plaintiff has submitted no expert report alleging deviations from expected standards of practice on the part of Overlook Hospital, Overlook Hospital is entitled to summary judgment in its favor.

It is well settled that in most instances, the plaintiff is required to produce expert testimony to establish a standard of medical practice and show defendant's deviation from that standard. *Parker v. Goldstein,* 78 N.J. Super. 472 (App. Div.), *certif. den.,* 40 N.J. 255 (1963). First, evidence must be presented to establish the applicable standard of medical practice in the particular case and second, it must be evidenced that the doctor or hospital negligently departed from this recognized standard of care in the treatment of the patient.

The holding in *Parker* is consistent with earlier case law in New Jersey. In *Carbone v. Warbuton,* 11 N.J. 418 (1953) and *Clark v. Witchman,* 72 N.J. Super. 486 (App. Div. 1962), the courts held that the legal duty "must be measured by some medical standard of care and treatment, and what that is and whether a defendant negligently departed from it to the plaintiff's injury, can competently be testified to only by one qualified to know of it." 11 N.J. at 428; 72 N.J. Super. at 497.

Appendix F

In order to establish any liability on the part of the defendant, it is incumbent upon the plaintiff to provide the jury with such expert testimony as will establish by a preponderance of the credible evidence that there was a deviation from the applicable standard of care. In *Sanzari v. Rosenfeld,* 34 N.J. 128 (1961), the Supreme Court followed the same reasoning:

> In the ordinary. . .medical malpractice case. . .the jury is not competent to supply the standards by which to measure the defendant's conduct. Since it has not the technical training necessary to determine the applicable standard of care, it cannot, without more, form a valid judgment as to whether the defendant's conduct is unreasonable under the circumstances. Therefore, ordinarily when a physician. . .is charged with negligence in the treatment of a patient, the standard of practice to which he failed to adhere must be established by expert testimony. In such cases if the plaintiff does not advance expert testimony establishing an accepted standard of care, it is proper for the court to grant a dismissal at the close of plaintiff's case.

34 N.J. at 135.

Accordingly, in all cases, with the exception of those falling under the "common knowledge doctrine" which is not applicable here, expert medical testimony is critical to plaintiff's burden in establishing the defendant's liability. Thus, it is respectfully submitted that because plaintiff has failed to furnish any expert report which criticizes the care and treatment rendered by Overlook Hospital, the hospital is entitled to judgment in its favor as a matter of law. *Judson v. Peoples Bank and Trust Co. of Westfield,* 17 N.J. 67 (1954).

Appendix F

Furthermore, it must also be mentioned that plaintiff has failed to take the curative action with respect to the proper party plaintiff in this case within the time limits set by the Appellate Division. For this reason, it is also submitted that dismissal of the Complaint is warranted pursuant to *Rule* 4:37-2(a).

CONCLUSION

Based upon the foregoing, it is respectfully requested that defendant Overlook Hospital is entitled to summary judgment based upon the lack of expert testimony or, in the alternative, for dismissal of plaintiff's Complaint based upon his failure to comply with the decision of the Appellate Division.

Respectfully submitted,

McDONOUGH, MURRAY & KORN, P.A.
A Professional Corporation

By: s/ Susan McCarthy Moryan
Susan McCarthy Moryan

Dated: July 31, 1986

APPENDIX G—ORDER OF NEW JERSEY APPELLATE DIVISION OF MARCH 5, 1987 DENYING PLAINTIFF'S APPEAL OF GRANT OF SUMMARY JUDGMENT AS INTERLOCUTORY

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-1573-86T6
MOTION NO. M-2653-86
BEFORE PART: G
JUDGE(S): FURMAN, SHEBELL, STERN

JOHN R. CONNER etc.

vs.

R. G. SACHS, M.D., T.V. INGLESBY, M.D., J.A. BELLADONA, M.D. et al

MOTION FILED: FEBRUARY 5, 1987

ANSWER(S) FILED: MARCH 2, 1987 BY: JOHN CONNOR

SUBMITTED TO COURT: MARCH 4, 1987

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 5 DAY OF MARCH, 1987, HEREBY ORDERED AS FOLLOWS:

MOTION BY RESPONDENT OVERLOOK HOSPITAL TO DISMISS THE APPEAL

Appendix G

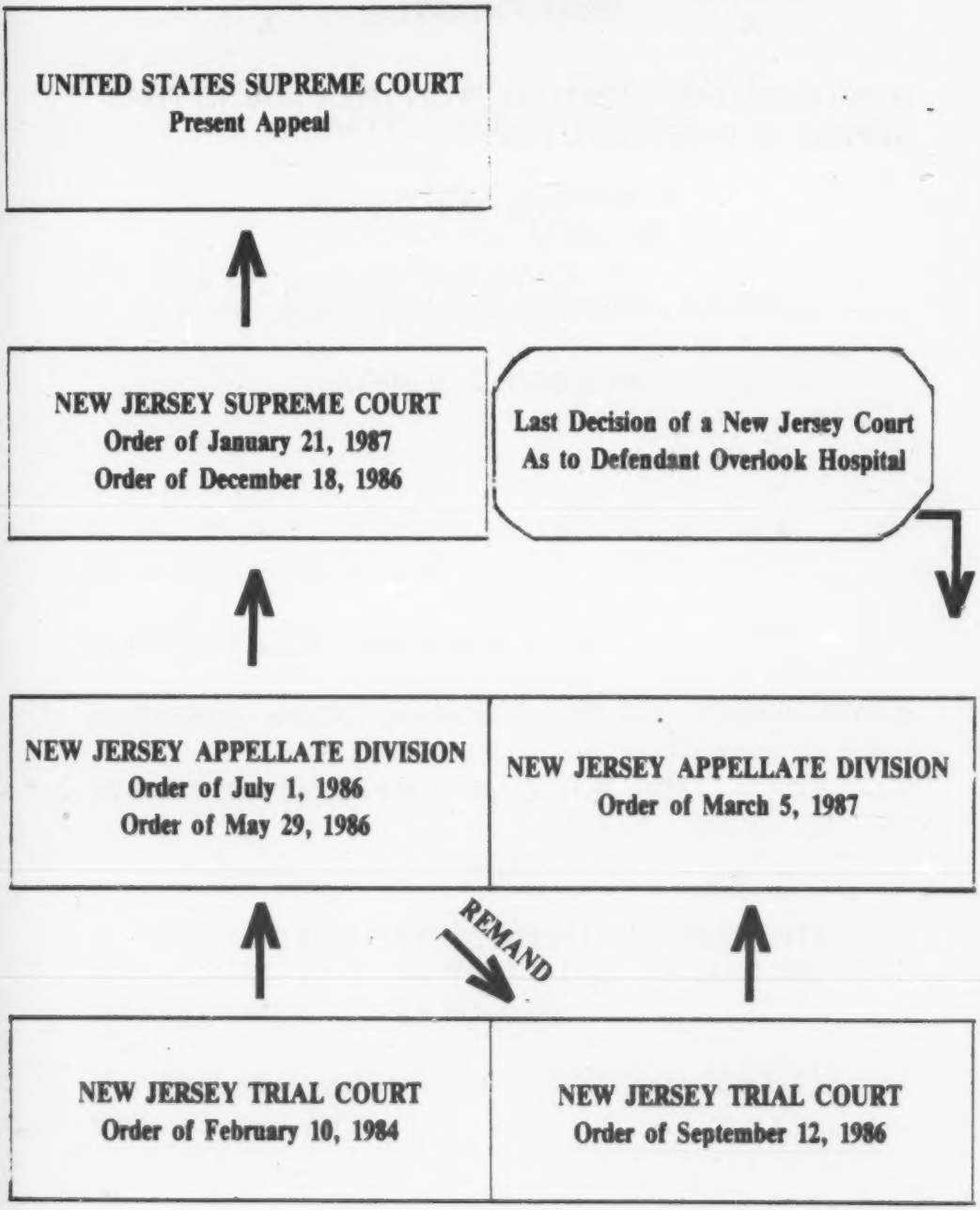
GRANTED	DENIED	OTHER
X		X

SUPPLEMENTAL: DISMISSAL IS ON THE GROUND THAT APPEAL IS INTERLOCUTORY.

FOR THE COURT:

s/ David D. Furman, P.J.A.D.
DAVID D. FURMAN, P.J.A.D.

APPENDIX H—GRAPHIC REPRESENTATION OF THE PROCEDURAL HISTORY OF THE CASE



Supreme Court, U.S.
FILED
JUN 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1727

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN R. CONNOR,

Appellant,

vs.

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N. L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

John R. Connor, Pro se
380 Wyoming Avenue
Millburn, New Jersey 07041
(201) 762-5587

8 June, 1987

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COUNTERSTATEMENT OF THE CASE.

In its Statement of the Case, Movant erroneously states that Appellant "declined to offer the will for probate, as mandated by a New Jersey statute." (Db 8, ¶3-10). This statement misleadingly omits all reference to the fact that Appellant appealed the Administrator's appointment up to the level of the U. S. Supreme Court, said appeals only finally terminating in 1981, Connor v. Warren, cert. den. 449 U.S. 1079 (1981), in which case the proper designation is of a "delayed" probate. In fact, Appellant informed the Administrator (and the court) of his mother's testacy immediately after Warren's appointment and further offered to probate the will promptly upon Warren's resignation, which offer Administrator Warren declined.

Movant erroneously states that the December 3, 1979 judgment "appoint[ed] Mr. Warren

as administrator with the will annexed . . ." (Db 8, ¶5-19). The judgment referred to actually appointed one Lucas E. Phillips, Jr., as Administrator, C.T.A. (See: Db, App. A, pp. 1-3a). Ignored by Movant is the very large time gap of 16 months between the Administrator's appointment on May 26, 1978 (See: Pb, App. O, p. 28a) and his incarceration of Appellant on September 23, 1979 to get possession of decedent's will. (See: Pb, Statement of Facts, p. 6). Thus, although the Administrator knew of the existence of Mrs. Connor's will right after his ex parte appointment, he did nothing with his office for 16 months, and only moved to take possession of the will 2 months before a Wrongful Death suit had to be filed, and then delayed its probate until 10 days after limitations expired on this suit.

Movant has omitted all reference to the fact that Appellant only filed the within suit after Administrator Warren's refusal to

file same on November 16, 1979. (Db, ¶6-23). Attached hereto is a copy of the relevant portion of Warren's letter wherein he refused to file the within suit. (App. A, infra, p. 1ra).

In its discussion of the trial court's dismissal of this suit as to defendant Overlook Hospital on September 12, 1986, Movant makes no mention of the circumstance that the dismissal occurred while Appellant's second appeal was still pending before the New Jersey Supreme Court, a fact not overlooked by Judge Barbara Wecker who, on January 30, 1987, denied the dismissal motion of the defendant-physicians on the ground that "plaintiff has met the time limits set forth in the Appellate Division opinion filed May 29, 1986 because the time limits therein were tolled by the pendency of the appeal to the New Jersey Supreme Court . . ." (See: Pb, App. L, pp. 22-23a). (Emphasis added). If Appellant's second "as of right" appeal had

such a "tolling" effect on the second dismissal motion, it can only possess identical effect on the first dismissal motion of defendant Overlook Hospital, whose September 12, 1986 order of dismissal can only be void.

At the end of its Statement, Movant states that Appellant is "essentially appealing the Appellate Division's interlocutory order entered May 29, 1986. . ." (Db 10, ¶3-22). As explained and argued in Appellant's Jurisdictional Statement, he is appealing from both the New Jersey Supreme Court's order of dismissal and the decision of the Appellate Division which "finally" adjudicated the constitutional issue in this case, notwithstanding the Appellate Division's disingenuous disclaimer that it "need not reach the constitutional issue raised by plaintiff. . ." (See: Pb, App. D, p. 6a).

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ARGUMENT

I.

APPELLANT IS ENTITLED TO REVIEW UNDER 28 U.S.C. §1257(2) BECAUSE THE STATE COURTS HAVE FINALLY DECIDED THE FEDERAL QUESTION IN THIS CASE.

At no point in its brief has Movant countered Appellant's argument that he is entitled, under the exception denominated in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), to Supreme Court review of the state courts' decision on the federal issue in this case. (Appellant's argument on this point is contained on pages 56-63 of his Jurisdictional Statement). Appellant has admitted the possibility of further trial-level proceedings in this case (see: Jurisdictional Statement, p. 58), however, this state of affairs does not preclude the Supreme Court from treating "the [State] decision on the federal issue as a final judgment for the purposes of 28 U.S.C. §1257. . ." Cox, supra,

at 477.

* * *

Movant erroneously asserts that Appellant is "appealing the Appellate Division's interlocutory order of May 29, 1986." (Db 11-16). (Emphasis added). The decision of the Appellate Division is in no sense an interlocutory order. That decision has reversed the trial court's dismissal of this case and reinstated the trial court's jurisdiction to proceed with the case. As such, upon the conclusion of the present appeal, the decision will become the "law of the case":

> The [appellate] mandate is a judicial precept that must be enforced as written. Relief from its directions, even though manifestly erroneous, can be had only in the appellate court whose judgment it is * * * and [it] is therefore a command to be obeyed * * * The appellate judgment becomes the law of the case; and the mandate is the direction for conforming judicial action.

Application of Plainfield-Union Water Co., 14 N.J. 296, 102 A2d 4 (1954).

The basis for Appellant's argument that the Appellate Division's May 29, 1986 decision "finally" decided the federal issue in this case is his argument that the Appellate Division's terms of remand, in "substance and effect," are a "hidden" decision affirming the constitutionality of N.J.S.A. 2A:31-2 because, upon their execution by Appellant, they would effect a waiver of Appellant's "standing" claim and cause his automatic replacement in this suit by the Administrator, C.T.A. - which result is precisely in accord with the statute's provision that only an executor or administrator, c.t.a., can file a wrongful death suit when the decedent dies testate. This argument, advanced in Appellant's Jurisdictional Statement, at pages 38-47, has also not been challenged by Movant.

* * *

Movant's argument for dismissal is basically predicated on a false application of New Jersey

Rule 2:2-5 (Db 12, ¶2-26).[1] Movant's entire argument fails, however, because the original appeal to the Appellate Division was not from an interlocutory order, but from the 1974 final trial court order dismissing the within complaint, with prejudice, as to all defendants.

Movant has similarly failed to address Appellant's argument that the criteria enunciated by the New Jersey Supreme Court in Tidewater v. Mayor and Council of Cartaret, 44 N.J. 328 (1965) require "new" constitutional questions of substance to proceed via appeal and not the discretionary writ of certification. The Tidewater decision is still applicable and its criteria have not been revised in any subsequent decision of the New Jersey Supreme Court. Consequently, "the New Jersey Supreme

---

[1] "A judgment of the Appellate Division on an appeal to it from an interlocutory order, decision or action shall be deemed to be interlocutory and not appealable to the Supreme Court as a final judgment, unless the judgment of the Appellate Division is dispositive of the action." R. 2:2-5.

Court has no discretion to decline to hear [an appeal on a federal constitutional question]. It is obliged to hear it and decide it on the merits, by reason of N.J. Const. 1947, Art. 6, sec. 5, par. 1(a). . ." United States ex rel. Herring v. Fenton, 531 F.Supp. 937 (D. N.J. 1981).

* * *

A signifigant part of Movant's first argument (Db pp. 12-14) is devoted to the September 12, 1986 order of the trial court dismissing this case as to defendant Overlook Hospital. Aside from the fact that this order is not before the Supreme Court for review, it is noted that Movant omits all reference to Judge Wecker's January 30, 1987 order (see: Counterstatement, infra), which can only import an eventual ruling that Judge Sachar was without jurisdiction to enter the dismissal for defendant Overlook Hospital because the "filing of the notice of appeal invok[ed] the jurisdiction of the appellate tribunal * * * and

divest[ed] the lower court of jurisdiction save as reserved by statute or court rule." Application of Plainfield-Union Water Co., supra, at 4. (The reference is to Appellant's notice of appeal filed with the New Jersey Supreme Court on July 25, 1986 from the Appellate Division's decision in this case).

* * *

Movant argues (Point II) that the constitutional issue "was not expressly passed on by the Appellate Division." (Db 15-19). Separate and apart from Appellant's argument that the Appellate Division's decision did, indeed, expressly uphold N.J.S.A. 2A:31-2, the law of New Jersey requires that, on an appeal to the New Jersey Supreme Court, the constitutional question need only have been "presented" to the Appellate Division. State v. De Meo, 20 N.J. 1 (1955). In fact, the New Jersey Supreme Court will even entertain constitutional questions not raised below where " 'it

is manifest that justice requires consideration of an issue central to a correct resolution of the controversy. . .' " Meeker v. Meeker, 52 N.J. 59 (1968). And the fact that a state's highest court declines review of a federal question constitutes no bar to Supreme Court review. See: Staub v. City of Baxley, 355 U.S. 313 (1958).

II.

APPELLANT HAS AT ALL TIMES ABIDED BY THE LAW. THE "STANDING" PROBLEM THAT HAS ARISEN IN THIS CASE IS A RESULT OF THE STATE COURTS' RESTRICTIVE INTERPRETATION OF N.J.S.A. 2A:31-2 AS WELL AS THE CONDUCT AND REFUSAL OF THE ADMINISTRATOR TO FILE THIS WRONGFUL DEATH SUIT.

Movant erroneously argues (Point III) that Appellant refused to probate his mother's will and that, therefore, he is somehow thereby precluded from challenging the constitutionality of N.J.S.A. 2A:31-2. The legal situation was more complicated than this simple

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argument would admit. In fact, Appellant was at the time engaged in appealing the Administrator's appointment, in consequence whereof the probate was "delayed." By virtue of New Jersey law, that appeal stayed all proceedings before the trial court:

> It is erroneous for the probate court to grant an order affecting the rights of the parties as to the subject matter of the appeal, for the reason that the proceedings before the probate court are stayed * * * The appellant, who has duly complied with the statutory regulations, deprives the probate court of any power over the subject matter during the pendency of the appeal.

Hill's Case, 55 N.J. Eq. __(Prerog. Ct. 1897). See also: Brown v. Ryder, 42 N.J. Eq. 358 (Prerog. Ct. 1886) (Where an appeal has been taken from the appointment of an administrator, his powers are suspended). Also, as recounted in the Counterstatement, infra, Appellant had early offered to withdraw his appeal and probate the will if the Administrator would first resign his office. However,

the Administrator declined to compromise.

* * *

Movant states that "[n]owhere in plaintiff's Jurisdictional Statement is it argued that he was somehow prevented from qualifying as executor." (Db 16-22). To the contrary, Appellant showed precisely how he was prevented from qualifying as executor and filing this suit when the Administrator used court process to arrest Appellant and gain possession of decedent's will just two months before limitations was due to expire on this suit. (See: Jurisdictional Statement, pp. 6-7). There was ample opportunity remaining in which Appellant might well have opted to discontinue further prosecution of the Warren appeal and probated the will in order to ensure the timely filing of this suit. That choice, however, was eliminated when Warren gained possession of the document and conveniently delayed its probate until 10 days after limitations had expired on November 24, 1977.

Consequently, on the latter date, decedent's estate was in transition from "intestate" to "testate" and a (different) Administrator, C.T.A. was replacing Administrator Warren. There is no other plausible explanation for the Administrator's actions but that he was deliberately attempting to create an "interregnum" under which no one would have statutory responsibility for filing this suit.

* * *

Movant's citation to Corbitt v. New Jersey, 439 U.S. 212 (1978) is irrelevant. This Appellant is not a criminal defendant. Nor is he responsible for the tragic death of Mary A. Connor that occurred in Overlook Hospital on November 24, 1977, which loss of life is directly attributable to the defendants herein. Because Administrator Warren failed in his non-delegable duty to file this suit, these defendants should not be permitted to escape the consequences of their actions merely

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because her son, as beneficiary, was compelled to file this suit.

* * *

Movant cites to the case of Morey v. Doud, 354 U.S. 457 (1957) in support of its argument that "[a]bsent any showing of such invidious discrimination, the legislative structure of the wrongful death statute must be upheld." (Db 17-32). In rebuttal, suffice it to be stated that: first, Morey v. Doud dealt with an economic regulation, not a wrongful death statute; and, second, the decision was specifically overruled by the U. S. Supreme Court in New Orleans v. Duke, 427 U.S. 297 (1976). The "invidious discrimination" that is prohibited by the Fourteenth Amendment has been demonstrated by Appellant in his Jurisdictional Statement where he has shown that N.J.S.A. 2A:31-2 does not treat alike "all persons similarly situated," Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1919). The statute grants all interested

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beneficiaries the right to prosecute wrongful death actions where there is an intestacy, but not at all in the event of a testacy.

* * *

For the above reasons, Appellant requests that the Supreme Court deny Movant's motion for the dismissal of this appeal and proceed to resolve the constitutional issue in this case. Otherwise, this Appellant will apparently have no other recourse but to defy the Appellate Division's offending remand terms, in order to preserve the federal issue, which course of action, absent Supreme Court review, would have been the only alternative for the Pharmacy Board in North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 163 (1973).

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CONCLUSION.

For the reasons hereinabove stated, Appellant requests that the Court deny the motion to dismiss this appeal which is properly before the Court under 28 U.S.C. §1257(2) or, alternatively, 28 U.S.C. §1257(3).

Respectfully submitted,

John R. Connor, Pro se

Dated: 8 June, 1987

APPENDIX "A"

LAW OFFICES
GEORGE WARREN

112 Nassau Street
P.O.Box 645
Princeton, New Jersey 08540
(609) 924-8900
(609) 394-7141

November 16, 1979

Mr. John R. Connor
380 Wyoming Avenue
Millburn, New Jersey 07041

Re: Complaint for Wrongful Death of Mary A. Connor

Dear Mr. Connor:

I am having difficulty in sorting out your motive in the type of communications you have been addressing to me including your most recent letter dated November 15 with the accompanying "Complaint for Wrongful Death." Under date of November 10, in a letter to Judge Gaulkin withdrawing your Order to Show Cause, you again attack the Order appointing me. Despite that, five days later, you send me a letter in which you say it is my "duty" to file a complaint on behalf of your late mother in a capacity as "Plaintiff-Administrator." The conflict in your position should be apparent to you.

[material omitted]

I point out to you that the two year statute of limitations on negligent actions may have expired in your mother's case and most

certainly will expire on the current anniversary of your mother's death which I believe was the 24th of this month. If there is any basis for a Complaint in negligence, it will have to be filed almost immediately. In view of the situation, created basically by your own actions, I can only suggest that you immediately bring this problem to the attention of competent counsel so that a proper Complaint can be filed within the next week. The Complaint you forwarded me and your check payable to the Clerk of the Superior Court in the sum of $60.00 are herewith returned.

Very truly yours,

/s/ George Warren
George Warren

GW:ad
Encls.